Supreme Court, U.S.
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IN THE

Supreme Court of the United States

QWEST CORPORATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

SPRINT COMMUNICATIONS CO. L.P., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Could the Ninth Circuit, in the context of reviewing a state regulator's implementation of FCC rules under the Telecommunications Act of 1996, second-guess the Eighth Circuit's determination on Hobbs Act review that those rules were unlawful?

2. Did the Ninth Circuit err by upholding a state regulator's imposition of a collocation requirement based on an FCC statutory interpretation that this Court had rejected as contrary to the Telecommunications Act of 1996, and by refusing to reconsider its ruling after the D.C. Circuit, on direct Hobbs Act review, vacated as contrary to the Act an FCC rule imposing the very same collocation requirement?

3. Could the Ninth Circuit adopt a standard of review of state regulators' implementation of the Telecommunications Act of 1996 that disables federal court review to ensure compliance with federal law and that effectively delegates plenary authority to state regulators to create purportedly federal obligations without any basis in federal law?

PARTIES TO THE PROCEEDING

AT&T Communications of the Pacific Northwest, Inc.

Gillis, William P., in his official capacity as Commissioner of the Washington Utilities and Transportation Commission

Hemstad, Richard, in his official capacity as Commissioner of the Washington Utilities and Transportation Commission

Levinson, Anne, in her official capacity as Chairperson of the Washington Utilities and Transportation Commission

MCI Metro Access Transmission Services, Inc.

MCI Telecommunications Corporation

Qwest Corporation, formerly known as U S WEST Communications, Inc.

Sprint Communications Company L.P.

Washington Utilities and Transportation Commission

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court as follows:

On June 30, 2000, U S WEST, Inc., the parent and sole shareholder of petitioner U S WEST Communications, Inc., merged with and into Qwest Communications International, Inc. Qwest Communications International, Inc. is a publicly held corporation that has no parent company. No publicly held company owns ten percent or more of the stock of Qwest Communications International, Inc.

On July 6, 2000, petitioner U S WEST Communications, Inc. was renamed Qwest Corporation. Qwest Corporation is now a wholly owned subsidiary of Qwest Communications International, Inc.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Qwest Corporation[1] respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these related cases.

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[1] As noted in the Rule 29.6 statement, U S WEST Communications, Inc. ("U S WEST") has been renamed Qwest Corporation as the result of a recent merger. To be consistent with the terms used in the decisions below, petitioner will use the name "U S WEST" in this petition.

OPINIONS BELOW

The decision of the court of appeals in *MCI Telecommunications Corp. v. U S WEST Communications* (App. 1a) ("*MCI*") is reported at 204 F.3d 1262 (9th Cir. 2000). The decisions of the court of appeals in *U S WEST Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 2000 WL 249692 (9th Cir. Mar. 3, 2000) (App. 18a) ("*AT&T*") and *U S WEST Communications, Inc. v. Sprint Communications Co.*, 2000 WL 249696 (9th Cir. Mar. 3, 2000) (App. 21a) ("*Sprint*") are unreported follow-on decisions that contain no independent analysis.

JURISDICTION

The decision of the court of appeals in *MCI* was issued on March 2, 2000. The decisions of the court of appeals in *AT&T* and *Sprint* were issued on March 3, 2000. The court of appeals denied U S WEST's petitions for rehearing or rehearing en banc in *MCI* and *Sprint* on May 8, 2000, and in *AT&T* on May 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner challenges all three judgments in this petition pursuant to Supreme Court Rule 12.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue here, 47 U.S.C. §§ 251 and 252, are reproduced at App. 149a.

STATEMENT OF THE CASE

This case presents two sharp circuit conflicts—each between the Ninth Circuit and a court exercising exclusive jurisdiction under the Hobbs Act to review FCC orders—regarding obligations of incumbent local exchange carriers under the Telecommunications Act of 1996 ("the Act"). It also presents a question of the role of federal courts in reviewing state regulators' implementation of the Act.

Reviewing a state commission's implementation of the interconnection provisions of the Act, the Ninth Circuit upheld state regulators' imposition of regulatory requirements that other federal courts—including this Court and other circuits on Hobbs Act review—have invalidated as contrary to the Act. First, the court below upheld a requirement that U S WEST expend resources to combine network elements on behalf of competing carriers, even though the Eighth Circuit—acting under its *exclusive* jurisdiction pursuant to the Hobbs Act—had vacated the FCC's attempt to impose the identical requirement and recently reaffirmed that holding. Second, the court permitted state regulators to require an incumbent carrier to open its premises to competitors' equipment whenever the competitors might find it "useful," even though this Court has held that "usefulness" is not a legitimate basis for regulating incumbents' activities under the Act. Shortly after the court below released its decisions, the D.C. Circuit, on Hobbs Act review of the same collocation requirement, confirmed that this Court's holding necessarily invalidates broad physical takings such as the one the Ninth Circuit upheld, yielding a direct circuit split.

Both of these errors flowed from the Ninth Circuit's fundamental misunderstanding of its role in the statutory scheme. The Act is not merely a starting point beyond which state regulators may impose any additional federal obligations they choose, particularly when the courts charged with reviewing the FCC's rules have held that the Act bars the FCC from imposing those same obligations. Congress empowered federal courts to "bring [state regulators] to heel" if they exceed their limited authority to apply federal law. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). The decisions below essentially disable this check, ceding control of federal telecommunications policy to the states within a single circuit while federal control under Congress's scheme remains intact in the rest of the country. The Ninth Circuit failed to recognize that the Act establishes

a national telecommunications policy, not a virtually blank slate on which each state can write its own purportedly "federal" policy.

Certiorari is warranted in these cases to resolve the sharp conflicts between the Ninth Circuit's illegitimate holdings and the authoritative Hobbs Act determinations by the Eighth and D.C. Circuits and to restore meaningful judicial review of state regulators' implementation of federal telecommunications law.

A. The Telecommunications Act of 1996

As this Court recognized last year, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*), "fundamentally restructures local telephone markets," shifting significant authority over those markets from state regulators to the Federal Communications Commission ("FCC"). *Iowa Utils. Bd.*, 525 U.S. at 371; *see also id.* at 378 n.6 (Congress "unquestionably" took "the regulation of local telecommunications competition away from the states" when it passed the Telecommunications Act, at least "[w]ith regard to the matters addressed" by the legislation.). Section 251 of the Act imposes a series of network- and market-opening obligations on incumbent local exchange carriers ("LECs") to enable new competitors to enter the market, *see* 47 U.S.C. § 251, and Congress specifically charged the FCC with adopting rules to implement those obligations. *See id.* § 251(d)(1). Like most FCC edicts, the FCC rules implementing the Telecommunications Act are directly and exclusively reviewable in the federal circuit courts of appeals pursuant to the Hobbs Act. *See* 47 U.S.C. § 402(a); 28 U.S.C. §§ 2341 *et seq.*

The Act also invites state public utility commissions to aid in the implementation of the FCC's rules. It requires incumbent local exchange carriers and new entrants to negotiate the terms of their relationships, and if voluntary

negotiations fail, authorizes either side to request arbitration by the relevant state public utility commission. *See* 47 U.S.C. § 252(a), (b). In those circumstances, the state commission is authorized to "impos[e] appropriate conditions as required to implement [§ 252(c)]," which in turn requires the commission to "ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [Federal Communications] Commission pursuant to [that] section." *Id.* § 252(b)(4)(C), (c)(1). Put simply, any conditions (other than pricing and implementation schedules, *see id.* § 252(c)(2), (3)) imposed under the authority of federal law must be limited to those required to achieve compliance with § 251 and implementing FCC rules. *See also id.* § 252(e)(2)(B).

As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. In order to maintain federal control of federal telecommunications law and policy, Congress subjected state commissions' decisions to judicial review in federal district courts "to determine whether [they] meet[] the requirements of section[s] 251 and [252]." 47 U.S.C. § 252(e)(6). This Court has noted that such review is vital to ensuring the primacy of federal regulation under the Act: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.[2] For purposes of this case, the most important aspect of § 252(e)(6) district court review is that the reviewing court must determine whether

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[2] The role of federal court review was not at issue in *Iowa Utilities Board*, which focused instead on who would determine the federal policy that state regulators would implement: "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew." *Id.*

the state regulator's arbitral decision "meet[s] the requirements of" § 252, including that section's requirement that state regulators follow FCC rules in arbitrating disputes. *See* 47 U.S.C. § 252(c)(1).

B. The FCC's Local Competition Order and the Proceedings in the Eighth Circuit and This Court

Section 251(c)(3) of the Act obligates incumbent LECs "to provide, to any requesting telecommunications carrier . . . , nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). The incumbent must further "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." *Id.* The FCC adopted a series of rules implementing this provision. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (hereinafter "*Local Competition Order*") (codified in pertinent part at 47 C.F.R. §§ 51.301 *et seq.*).

Petitioner U S WEST, other incumbent carriers, and state public utility commissions petitioned for review of the FCC order under the procedures laid out in the Hobbs Act. Pursuant to those procedures, the petitions were consolidated into a single court—the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit vacated several of the FCC's rules, including rules requiring an incumbent, upon a competing carrier's request, to combine separate network elements purchased by the competitor. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

The FCC and others successfully challenged several aspects of the Eighth Circuit's decision in this Court. *See Iowa Utils. Bd.*, 525 U.S. 366. The parties did not seek review of the vacation of the rules requiring incumbents to

combine separate elements, and this Court never addressed those rules. On remand, the Eighth Circuit directed the parties to address the effect of this Court's decision on a number of FCC rules, including the still-vacated network combination rules. Last month, the court issued a decision reaffirming its earlier holding that the rules are unlawful. *Iowa Utils. Bd. v. FCC*, No. 96-3321, — F.3d —, 2000 WL 979117, at *13 (8th Cir. July 18, 2000).

C. The FCC's Interpretation of "Necessary" and the Proceedings in This Court and the D.C. Circuit

Section 251(c)(6) of the Act requires incumbent carriers to open their offices to their rivals' equipment if that equipment is "*necessary* for interconnection or access to unbundled network elements"—a duty known as "physical collocation." 47 U.S.C. § 251(c)(6) (emphasis added). The FCC interpreted "necessary" to include anything that might be "used" or "useful" for interconnection by a competitor. *Local Competition Order*, 11 FCC Rcd 15499, 15794 ¶ 579 (1996).[3]

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[3] The FCC had determined that it would be "necessary" for a new entrant to have access to an incumbent's plant whenever the competitor would suffer "any increase in cost" at all without access. *See Iowa Utils. Bd.*, 525 U.S. at 390. Hence, the FCC defined anything that would be "used" by or "useful" to a competitor as "necessary." *Local Competition Order*, 11 FCC Rcd 15499, 15794 ¶ 579 (1996).

The FCC also articulated this definition in connection with a different subsection of § 251(c). The Act requires an incumbent carrier to provide requesting carriers with unbundled access to certain network elements, to be determined by the FCC. *See* 47 U.S.C. § 251(c)(3), (d)(2). In making that determination, the FCC must consider whether particular elements are "necessary" to provision of local telephone service (if the elements are proprietary), or whether failure to provide access would "impair" the requesting carrier's ability to provide such service (if elements are nonproprietary). *Id.* § 251(d)(2). It was in this context that this Court reviewed the FCC's definition of "necessary" in *Iowa Utilities Board*, 525 U.S. at 387-92.

In *Iowa Utilities Board*, this Court invalidated the FCC's interpretation of "necessary" in a related provision, § 251(d)(2), as contrary to the language of the Act and legislative intent. *Iowa Utils. Bd.*, 525 U.S. at 389; *see infra* at 16-17. The FCC, however, continued to interpret "necessary" to mean "used or useful" for collocation purposes. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4776-77 ¶ 28 (1999). Incumbent LECs petitioned for review in the D.C. Circuit under the Hobbs Act, and earlier this year that court, following this Court's reasoning, invalidated the FCC's interpretation as overbroad and unsupported by the statute. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416, 422-24 (2000).

D. The WUTC and Ninth Circuit Proceedings Below

In 1996, three competitive LECs separately began negotiating with U S WEST, an incumbent LEC, for interconnection in the State of Washington pursuant to § 251 of the Act. The competitive LECs were MCImetro Access Transmission Services, Inc. ("MCImetro"); Sprint Communications Company, L.P. ("Sprint"); and AT&T Communications of the Pacific Northwest, Inc. ("AT&T"). In each case, the parties were unable to resolve all issues by negotiation, and each competitive LEC requested arbitration by the Washington Utilities and Transportation Commission ("WUTC") pursuant to § 252. Following a hearing in each case, the appointed arbitrator issued separate reports in November and December 1996 resolving the outstanding issues in all three agreements.

In particular, the arbitrator in all three cases imposed a requirement that, in providing unbundled network elements purchased by the competitive LEC, U S WEST combine otherwise separate elements at the competitor's request. At the time, this provision was mandated by FCC rules. *See* 47

C.F.R. § 51.315(c)-(f) (reproduced at App. 171a). Separately, the arbitrator declined to require U S WEST to allow physical collocation of the competitive LECs' remote switching equipment on U S WEST's premises in the MCImetro and AT&T agreements. Collocation was not raised in the Sprint arbitration.

The WUTC adopted the arbitrator's decision in each case, except that it reversed the decision not to allow collocation of remote switching units (it did not require collocation of other equipment). The WUTC applied the FCC's definition of "necessary" as "useful," and concluded that remote switching units met that standard and that MCImetro and AT&T would be at a competitive disadvantage without collocation. *See* App. 89a-90a, 94a-95a. *See also* App. 111a, 120a. The WUTC therefore ordered U S WEST to allow MCImetro and AT&T to collocate remote switching units on U S WEST's premises. *See* App. 89a-90a, 94a-95a. Although the WUTC entered its order after the Eighth Circuit had vacated the combination rules, the WUTC did not address the effect of the decision on the combination provisions in the agreements.

U S WEST and the competitive LECs filed suit in the U.S. District Court for the Western District of Washington seeking review of the agreements and the WUTC's orders under § 252(e)(6). Although the district court issued separate orders in the three cases, the parties litigated them together. *See* App. 25a n.1. The district court upheld the WUTC's collocation rulings, but struck down the element combination requirements, recognizing that the arbitrator had applied the vacated FCC rules.

U S WEST then appealed to the Ninth Circuit in all three cases, and the competitive LECs cross-appealed.[4] While the appeals were pending, this Court issued its decision in *Iowa*

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[4] The WUTC also cross-appealed in the *AT&T* case.

Utilities Board, and the Eighth Circuit began its proceedings on remand, which included reconsideration of the validity of the FCC's combination rules in light of this Court's opinion. Nevertheless, the Ninth Circuit chose to second-guess the Eighth Circuit's earlier determination, concluding that "the Eighth Circuit's interpretation of the Act was incorrect." App. 9a. Finding that the Eighth Circuit's vacation of the FCC rules meant only that "the Act does not currently mandate" the WUTC's combination requirement, the court decided that the requirement did not violate the Act and thus must be restored to the agreement. *Id.*

The court went on to uphold the WUTC's collocation provision, even though it recognized that this Court had ruled that the interpretation of the Act on which the WUTC had relied was unlawful. App. 10a. The court disregarded the legal error because it believed that its "task is not to examine possible flaws in the WUTC's decision-making process, but to decide whether a provision resulting from the process . . . has resulted in an agreement" that violates the Act. App. 11a. The panel concluded that "[a]lthough the Act may not require the [collocation] provision, it certainly does not proscribe it." *Id.*[5]

Fifteen days after the court's decision in *MCI*, the D.C. Circuit, on Hobbs Act review, vacated the FCC's collocation rule on the identical legal grounds that U S WEST had argued before the Ninth Circuit. *See GTE Serv. Corp.*, 205 F.3d 416. U S WEST sought rehearing and rehearing en banc in all three cases below, urging the court below to reconsider its decisions in light of (1) the D.C. Circuit's intervening decision vacating the very same collocation standard that the WUTC had applied, and (2) the fact that the Eighth Circuit had vacated the combination rules and that it

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[5] The court explained its reasoning as to both issues in the *MCI* opinion, which it incorporated by reference, without further analysis, in the *AT&T* and *Sprint* decisions.

alone had jurisdiction under the Hobbs Act to reconsider the rules' validity in light of this Court's decision in *Iowa Utilities Board*. The court below denied rehearing in *MCI* and *Sprint* on May 8, 2000, and in *AT&T* on May 25, 2000.

REASONS FOR GRANTING THE PETITION

In the decisions under review, the Ninth Circuit upheld a state regulator's implementation of two separate FCC interpretive rulings, *even though* two other circuits with exclusive jurisdiction under the Hobbs Act had *vacated* those FCC rulings as violative of the Telecommunications Act. In one case, the Ninth Circuit declared that it simply believed its sister circuit's decision on Hobbs Act review to be wrong. In the other, it actually *agreed* that the state regulators had misinterpreted the governing provision of the Act (as authoritatively construed by this Court), but it assumed that state regulators are free to ignore such decisions. The resulting ruling leaves the Ninth Circuit in sharp conflict with two other courts' Hobbs Act determinations regarding significant provisions of the 1996 Act and balkanizes federal telecommunications policy in direct contravention of Congress's intent. It also authorizes state regulators to ignore binding judicial interpretations of the Act and of the FCC rules implementing it, thus turning the Act's jurisdictional scheme on its head.

I. THE NINTH CIRCUIT'S RULING ON THE COMBINATION REQUIREMENT INVADED THE HOBBS ACT JURISDICTION OF THE EIGHTH CIRCUIT.

The Ninth Circuit erred in upholding the WUTC's orders directing U S WEST to reconfigure the pieces of its network to suit its competitors wishes. The court improperly arrogated to itself the determination of the validity of the combination requirement and second-guessed the reasoning of the Hobbs Act court. The Ninth Circuit's illegitimate and

erroneous decision on the merits has resulted in conflicting applications of federal telecommunications law in different circuits—precisely what the Hobbs Act is intended to prevent.

Section 251(c)(3) of the Act obligates incumbent LECs to provide unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). The FCC adopted a series of rules implementing this provision. One FCC rule generally prohibited incumbents from separating requested network elements that they already combine for themselves. 47 C.F.R. § 51.315(b) (App. 171a) (hereinafter, the "no-separation" rule). Other FCC rules affirmatively required incumbents to build new combinations of elements on demand, even if the incumbents never built such combinations for themselves. *See* 47 C.F.R. §§ 51.315(c)-(f) (hereinafter, the "combination" rules).

As the court below acknowledged, App. 8a, the Eighth Circuit vacated all of those rules in October 1997 because it concluded that they "cannot be squared with" the language of the Act. *Iowa Utils. Bd.*, 120 F.3d at 813 ("[T]he plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent [carriers] to do *all* of the work."). On appeal from the Eighth Circuit, this Court reinstated the no-separation rule. In particular, the Court accepted the FCC's grounding of the rule in the nondiscrimination requirement of § 251(c)(3); the FCC contended that the rule was intended to prevent incumbent carriers from arbitrarily disconnecting elements that were already combined, "not for any productive reason, but just to impose wasteful reconnection costs on new entrants." *Iowa Utils. Bd.*, 525 U.S. at 395 (internal quotation marks and citation omitted).

The court below acknowledged that the vacation of the *combination* rules was not appealed to or reviewed by this Court and that "the Eighth Circuit's decision to vacate the

FCC regulation certainly still stands." App. 9a. The court below chose to ignore that decision, however, concluding that "[a]ll this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination." *Id.* And despite the then-pending remand to the Eighth Circuit, in which that court had made clear that it would reconsider the validity of the combination rules, the Ninth Circuit preempted its sister circuit:

> The [Supreme] Court's holding concerning Rule 315(b) [the no-separation rule] . . . confirms that the Eighth Circuit's interpretation of the Act was incorrect. The Court firmly stated that the Act's mention of 'unbundled access' does not even 'remotely imply' that elements must be provided only in uncombined form and never in combined form.

Id. (citing *Iowa Utils. Bd.*, 525 U.S. at 394). Therefore, the court upheld the WUTC requirement as consistent with the Act. *See id.*

The Ninth Circuit's ruling was erroneous on two levels. First, the Eighth Circuit had held, on direct Hobbs Act review of the FCC rules, that the Act *prohibits* regulators from ordering incumbents to build new combinations of network elements that do not now exist. Thus, a WUTC order implementing the unlawful FCC rule and imposing the exact same requirement *also* violates the Act. The court below acknowledged that the Eighth Circuit had vacated the only legal authority on which the WUTC orders were based as contrary to the Act, and that *alone* should have ended the inquiry. Second, the Ninth Circuit overstepped its jurisdiction by second-guessing the Hobbs Act court and effectively redetermining the validity of the combination rules.

Moreover, by contradicting both the Eighth Circuit's holding and this Court's analysis, the court's illegitimate

decision precipitated the very kind of conflict that the Hobbs Act is intended to prevent. Acting on remand from this Court under its Hobbs Act authority, the Eighth Circuit recently reaffirmed its earlier determination that the combination rules were contrary to the Telecommunications Act. *See Iowa Utils. Bd. v. FCC*, No. 96-3321, — F.3d —, 2000 WL 979117, at *12-13 (8th Cir. July 18, 2000). The Eighth Circuit recognized that this Court's reasons for upholding a rule barring incumbents from tearing apart their existing networks before giving competitors access to them have nothing at all to do with the vacated rules requiring incumbents to custom-build entirely new configurations of elements at their competitors' requests. The no-separation rule prevents incumbents from imposing wasteful and gratuitous burdens on competitors. *See Iowa Utils. Bd.*, 525 U.S. at 395 (FCC could rationally prohibit incumbents from "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants") (internal quotation marks and citation omitted). But the combination rules have nothing to do with such discrimination. Because these rules deal with elements that are not already combined, either the incumbent or its competitor will have to combine elements to provide a new service; leaving that task to the competitor when it buys the elements does not discriminate or impose any wasteful costs. Rather, it requires the competitor to incur the same costs that the incumbent would incur if it decided to offer a service requiring this new combination. Thus, the Court's rationale for reinstating the no-separation rule simply does not apply to the combination rules.

For that reason, the Eighth Circuit concluded that it was "not persuaded . . . that the Supreme Court's reinstatement of rule 51.315(b) affects our decision to vacate subsections (c)-(f)." *Iowa Utils. Bd.*, 2000 WL 979117, at *12. The court therefore reaffirmed that "subsections (c)-(f) violate the plain

language of the statute. We are convinced that rules 51.315(c)-(f) must remain vacated." *Id.* at *13.

Indeed, the court made a point of chiding the Ninth Circuit for second-guessing its earlier decision:

> Nor do we agree with the Ninth Circuit that the Supreme Court's opinion undermined our rationale for invalidating the additional combinations rule. The Ninth Circuit *misinterpreted our decision* to vacate subsections (c)-(f). We did not, as the Ninth Circuit suggests, employ the same rationale for invalidating subsections (c)-(f) as we did in invalidating subsection (b). Rather, the issue we addressed in subsections (c)-(f) was who shall be required to do the combining, not whether the Act prohibited the combination of network elements.

Id. at *12 (citing *MCI* and *U S West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3669 (U.S. June 29) (No. 99-1641), *pet. for reh'g filed* (U.S. July 24, 2000)) (emphasis added).

The Court should grant this petition in order to rein in the Ninth Circuit's jurisdictional overreaching and to correct its illegitimate and unlawful endorsement of a vacated federal regulation. Given the recent decision of the Eighth Circuit reaffirming the rules' invalidity on Hobbs Act review, certiorari is warranted at least in order to vacate the judgments below and remand the cases to the Ninth Circuit with instructions to follow the Eighth Circuit's determination.

II. THE NINTH CIRCUIT'S COLLOCATION DECISION IGNORES THIS COURT'S AUTHORITATIVE CONSTRUCTION OF THE TELECOMMUNICATIONS ACT AND STANDS IN DIRECT CONFLICT WITH A DECISION OF THE D.C. CIRCUIT.

The court below erred in upholding the WUTC's requirement that U S WEST permit MCImetro and AT&T to collocate their switching equipment on U S WEST's premises. First, the Ninth Circuit acknowledged that this Court had rejected the FCC's interpretation of "necessary." Even recognizing that core error, however, the Ninth Circuit inexplicably allowed the resulting collocation requirement to stand. Moreover, even after the D.C. Circuit, on direct review under the Hobbs Act, vacated the very same FCC standard that the WUTC had applied, the Ninth Circuit declined to reconsider its ruling to comply with that authoritative determination of the applicable federal law. The Court should grant this petition to bring the Ninth Circuit in line with this Court's interpretation of the statute and with the D.C. Circuit's determination that the FCC standard that the WUTC had applied was invalid.

The Act imposes on an incumbent LEC the duty to allow collocation of equipment that is "necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Relying *solely* on the FCC's interpretation of "necessary" to mean "used" or "useful," *see supra* at 7 & 9, the WUTC found that it would be "useful" to MCImetro and AT&T to collocate its remote switching equipment on U S WEST's property, and it ordered U S WEST to place this equipment in its offices. *See* App. 89a-90a, 94a-95a.

This Court subsequently invalidated the FCC's legal interpretation, rejecting the agency's loose reading of "necessary" as contrary to the language of the Act and Congress's obvious intent. *Iowa Utils. Bd.*, 525 U.S. at 389.

Reviewing the FCC's similar interpretation of "necessary" in 47 U.S.C. § 251(d)(2), this Court held that "the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary' . . . is simply not in accord with the ordinary and fair meaning of those terms." *Id.* at 389-90. Moreover, the Court concluded that Congress intended the term "necessary" to be a meaningful limit on regulators' power over incumbent carriers, and thus that the statute "requires the Commission to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and *giving some substance to* the 'necessary' and 'impair' requirements." *Id.* at 391-92 (second emphasis added). In other words, said the Court, declaring everything that may be "used or useful" to be "necessary" simply wrote the latter term out of the Act.

Under the same reasoning, the FCC's collocation standard also cannot stand. The statutory condition that physical collocation be "necessary" must be given "some substance," and not simply collapsed into "used" or "useful." Indeed, the *Ninth Circuit itself* appeared to concede that the WUTC's use of this definition was irreconcilable with this Court's opinion, acknowledging that, if the standards of the Administrative Procedure Act applied, "we might agree . . . that the agency's use of an improper definition of 'necessary' requires us to return the agreement to the agency for reconsideration." App. 10a. Nevertheless, the court let the WUTC's error pass. The court limited its review to determining whether the requirement was irreconcilable with the statute, and concluded that "[a]lthough the Act may not require the provision, it certainly does not proscribe it." App. 11a. But that conclusion is simply wrong. Indeed, the Ninth Circuit's own concession that the WUTC's "improper definition" would violate the APA confirms that the definition is "not in accordance with law." 5 U.S.C. § 706. The statute provides for collocation *only* where it is "necessary" for interconnection. Because this Court held that

the statutory term "necessary" must be given both "substance" and "an ordinary and fair meaning," any rule reading it as merely "used or useful"—and any application, as here, of such a rule—does indeed violate the Act.

The Ninth Circuit's refusal to give this Court's holding its full effect created a direct conflict with the D.C. Circuit. The FCC's collocation rule under § 251(c)(6) was based on the very same definition of "necessary" on which the WUTC had relied. *Compare Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd at 4776-77 ¶ 28, *with Local Competition Order*, 11 FCC Rcd at 15794 ¶ 579. On direct review of the FCC's order under the Hobbs Act, the D.C. Circuit invalidated the "used or useful" standard as contrary to the Act, relying on this Court's reasoning. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). The court found the ordinary and fair meaning of "necessary" to be "fairly straightforward": "Something is *necessary* if it is *required* or *indispensable* to achieve a certain result." *Id.* at 422.[6] Therefore, the FCC's interpretation "seems overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6)." *Id.*

The D.C. Circuit followed this Court's analysis in *Iowa Utilities Board*, and rightly noted that the intrusive nature of forced collocation of competitors' equipment on incumbents' property calls for a narrow interpretation of the statute:

> As is clear from the [Supreme] Court's judgment in *Iowa Utilities Board*, a statutory

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[6] Most other courts to consider the question had already reached the same conclusion. *See, e.g., U S WEST Communications, Inc. v. Jennings*, 46 F. Supp. 2d 1004, 1026 (D. Ariz. 1999); *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1182 (D. Or. 1999); *U S WEST Communications, Inc. v. Minnesota Pub. Utils. Comm'n*, 55 F. Supp. 2d 968, 981 (D. Minn. 1999). As one district court put it, "Anyone who has ever packed for a trip knows the difference between items that might be 'used and useful' versus items that are really 'necessary.'" *MCI Telecomms. Corp.*, 41 F. Supp. 2d at 1182.

> reference to "necessary" must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit "necessary" to *that which is required to achieve a desired goal*. The Court's admonition seems particularly relevant here where a broader construction of "necessary" under § 251(c)(6) might result in an *unnecessary* taking of private property.

Id. at 423 (first emphasis added). The D.C. Circuit thus ruled that the FCC's interpretation was "impermissibly broad" and "finds no support in the Act." *Id.* at 424. "In short, the FCC's interpretation of 'necessary' under § 251(c)(6) goes too far and thus 'diverges from any realistic meaning of the statute.'" *Id.* (citation omitted).

U S WEST petitioned the court below for rehearing or rehearing en banc to allow the court to correct its error in light of the D.C. Circuit's ruling on Hobbs Act review. The D.C. Circuit's decision eliminated any doubt that mere "usefulness" was an inappropriate standard for collocation under § 251(c)(6). The Ninth Circuit's refusal to reconsider its rulings in *MCI* and *AT&T* in light of that decision thus compounded its original error. Certiorari is warranted not only to resolve the circuit conflict, but also to vindicate this Court's own interpretation of the Telecommunications Act. At the very least, this Court should grant the petition, vacate the judgments in *MCI* and *AT&T*, and remand those cases to the Ninth Circuit with directions to follow this Court's interpretation in *Iowa Utilities Board* and the D.C. Circuit's decision in *GTE Service Corporation*.

III. THE COURT BELOW APPLIED A STANDARD OF REVIEW THAT GIVES STATE REGULATORS PLENARY AUTHORITY TO CREATE FEDERAL OBLIGATIONS AND DISABLES FEDERAL COURTS FROM ENSURING THAT THOSE REGULATORS FOLLOW FEDERAL LAW.

Congress defined a narrow role for state regulators in arbitrating interconnection disputes under the Act. State regulators must resolve disputes according to federal law, and when acting on federal authority, may impose only those conditions that are required by federal standards. Federal court review under § 252(e)(6) is the essential check on state regulators in this plan; indeed, it is the exclusive means for testing whether state regulators have exceeded their limited authority.

The decision below upends Congress's careful plan. By limiting federal courts to asking whether a state has violated an express prohibition of the Act, the court suggests that state regulators may impose whatever obligations they choose and give those obligations the force of federal law, just as long as they avoid doing something explicitly barred by Congress. Such an outcome would delegate to state regulators far more power than Congress ever intended—indeed, more power than Congress gave the FCC.

A. The Act Defines a Narrow Role for States in Approving Arbitrated Agreements, and Federal Court Review Is the Exclusive Tool for Ensuring that States Stay Within That Role.

As this Court has observed, Congress "unquestionably" took "the regulation of local telecommunications competition away from the states" when it passed the Telecommunications Act, at least "[w]ith regard to the matters addressed" by the legislation. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. Section 251 of the Act directs

telecommunications carriers to open their networks in specific ways and negotiate with each other for access. *See* 47 U.S.C. §§ 251(a)-(c). Congress authorized the FCC to adopt rules implementing these standards, *see id.* § 251(d), and it forbade the states from taking any action inconsistent with the Act or the FCC rules implementing the Act. *See id.* § 261(c).

Section 252 sets the rules for negotiating and arbitrating interconnection agreements, and Congress established a limited role for the states in this process. A state regulator may arbitrate disputed issues, but only if the parties invoke its authority, and only on the specific questions the parties identify. *See id.* §§ 252(b)(1), (b)(4)(A). The state regulator must follow federal law in resolving disputes and may impose only three kinds of federal obligations on the parties: conditions to ensure compliance with the "requirements" of section 251 (together with the FCC rules implementing that section), pricing standards, and compliance timetables. *See id.* § 252(c)(1)-(3).

Federal district court review under § 252(e)(6) is the essential check for ensuring that state regulators obey federal law and stay within their permitted role. Indeed, it is the only check, since the Act bars state courts from reviewing these arbitrations. *See* 47 U.S.C. § 252(e)(4). This Court has acknowledged the authority of the federal district courts to ensure the primacy of federal law: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

In short, Congress carefully defined the relative domains of federal and state regulators. Under the Act, states are not simply "allowed to do their own thing"; rather, they "must hew" to the lines drawn by the FCC and federal courts. *Id.* But the decision below disables the federal courts from ensuring that states stay within those prescribed limits.

B. A Standard of Review That Authorizes Any and All State Action Not Directly Prohibited Threatens Federal Primacy.

The Ninth Circuit's standard of review frees state regulators to create federal law rather than apply it. The decision below suggests that any interconnection obligation a state regulator imposes in an arbitration will pass muster—whether or not it is actually based in the Act—unless the regulator has violated some specific statutory prohibition. This massive expansion of state power to create new federal regulatory obligations leaves state regulatory bodies with far more federal policymaking power than Congress ever intended.

Moreover, the court below simply dismissed as inapplicable the bedrock rule of administrative law: An agency cannot exercise federal authority without a specific delegation of power from Congress. Administrative agencies—even those with a mandate to serve the "public interest"—do not possess roving commissions to adopt whatever policies they see fit. *See NAACP v. Federal Power Comm'n*, 425 U.S. 662, 669-70 (1976). If this case involved an FCC decision, it would be obvious that the agency could not create new regulatory obligations out of whole cloth without any specific authorization in the Act; it is accepted that the FCC does not "possess[] *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." *Comsat Corp v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997) (internal quotation marks omitted). Yet under the Ninth Circuit's standard of review, state regulators can exercise the plenary federal authority that even the FCC lacks, since the standard frees them from grounding their rules in any affirmative statutory grant of power, and even permits them to impose the very same duties that federal courts have held are beyond the statutory authority of the FCC.

The errors discussed in Sections I and II demonstrate the danger posed by the court's virtually meaningless standard of review. The court upheld two requirements that the WUTC had imposed based on federal regulations that were subsequently invalidated. At the time of the Ninth Circuit's review, the FCC rules applied by the WUTC had been vacated by courts acting under the Hobbs Act and the collocation and combination requirements thus lacked *any* basis in federal law. Rather than strike those requirements, however, the Ninth Circuit ruled that even without an affirmative legal basis, the requirements could stand so long as they were not *specifically prohibited* by the Act. Finding no such proscription, the court upheld the baseless requirements. *See* App. 9a, 11a.[7] Indeed, the court took its "hands off" approach to such an extreme that, even where it conceded that the WUTC had applied an improper legal standard, the court refused to correct the error:

> Were we reviewing this agreement under the judicial review standards of the Administrative Procedure Act, we might agree with U S West that the agency's use of an improper definition of "necessary" requires us to return the agreement to the agency for reconsideration. . . .
>
> . . . Here, our task is not to examine possible flaws in the WUTC's decision-making process,

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[7] Even under the Ninth Circuit's erroneous standard of review, both requirements should have failed. As petitioner showed in Sections I and II, both requirements have been determined to violate the plain language of the Act. *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000) ("[T]he FCC's interpretation of 'necessary' under § 251(c)(6) [requiring physical collocation] goes too far and thus 'diverges from any realistic meaning of the statute.'") (citation omitted); *Iowa Utils. Bd. v. FCC*, No. 96-3321, — F.3d —, 2000 WL 979117, at *13 (8th Cir. July 18, 2000) (the combination requirements of 47 C.F.R. § 51.315(c)-(f) "violate the plain language of the statute").

> but to decide whether a provision resulting from that process—the provision requiring co-location—has resulted in an agreement that fails to "meet the requirements" of the Telecommunications Act.

App. 10a-11a (citations omitted).

The court derived its limited scope of federal court review from § 252(e)(6)'s language directing courts to examine whether a state-imposed obligation "meets the requirements of" § 251 and the regulations thereunder and the standards applicable under § 252. 47 U.S.C. § 252(e)(6); *see* App. 9a, 11a. But the natural reading of this language is that the court should ask whether the obligation is *affirmatively mandated* by § 251 or § 252; a duty that bears no connection to these sections (but is not contradicted by them) hardly meets their "requirements." Moreover, the court's statement that courts may not "examine possible flaws in [a state's] decision-making process" (App. 11a) wholly ignores § 252(e)(6)'s directive to consider whether the state has met the requirements of § 252; virtually all of that section deals with how states must conduct the arbitration process.

In short, the court below has interpreted the Act as a delegation of unbounded and unreviewable federal lawmaking power to state bodies. If left in place, the opinion will allow regulators in each state in the circuit to create new "federal" requirements out of whole cloth, and federal courts will be powerless to "bring [them] to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. Thus, the Ninth Circuit will have transformed a statutory scheme intended to create a single body of federal telecommunications law into a patchwork of nominally "federal" requirements that vary from state to state. Certiorari is warranted to restore the primacy and uniformity of federal law and the vital role of federal court review in ensuring that state regulators "hew" to that law. *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petitioner prays that this Court grant the petition for the purpose of vacating the judgment below and remanding the case to the Ninth Circuit with instructions to follow the decisions of the Eighth and D.C. Circuits.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-35819, 98-35820 and 98-35822.

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation; MCI Metro Access Transmission Services, Inc.,

Plaintiffs-Appellants,

v.

U S WEST COMMUNICATIONS, a Colorado corporation; The Washington Utilities and Transportation Commission (WUTC); Anne Levinson, Chair; Richard Hemstad; William P. Gillis, in their official capacities as Commissioners of WUTC,

Defendants-Appellees.

MCI Telecommunications Corporation, a Delaware corporation; MCI Metro Access Transmission Services, Inc.,

Plaintiffs,

v.

U S West Communications, a Colorado corporation;

Defendant-Appellant,

The Washington Utilities and Transportation Commission (WUTC); Anne Levinson, Chair; Richard Hemstad; William P. Gillis, in their official capacities as Commissioners of WUTC,

Defendants-Appellees.

MCI Telecommunications Corporation, a Delaware corporation; MCI Metro Access Transmission Services, Inc.,

Plaintiffs-Appellees,

v.

U S West Communications, a Colorado corporation; Anne Levinson, Chair; Richard Hemstad; William P. Gillis, in their official capacities as Commissioners of WUTC,

Defendants,

and

The Washington Utilities and Transportation Commission (WUTC),

Defendant-Appellant.

Argued and Submitted Oct. 7, 1999

Filed March 2, 2000

Before: GOODWIN, SCHROEDER, and GRABER, Circuit Judges

SCHROEDER, Circuit Judge:

INTRODUCTION AND STATUTORY BACKGROUND

This is an appeal by U S West Communications, Inc. ("U S West") and a cross-appeal by MCI Telecommunications Corporation ("MCI") from a district court judgment entered after review of a Washington Utilities and Transportation Commission ("WUTC") decision. The WUTC decision approved an agreement between U S West and MCImetro Access Transmission Services, Inc.

("MCImetro"), an MCI affiliate, under the Telecommunicaitons Act of 1996 ("the Act"), codified in part at 47 U.S.C. §§ 251-61. The agreement sets forth the terms under which MCImetro may interconnect with U S West, the former state regulated monopolist, in order to operate as a competing local telecommunications provider in the Seattle/Bellevue area.

The Act calls upon federal courts to hear challenges to interconnection agreements developed and approved through state administrative proceedings. Review in federal court is limited to the determination of whether the agreement "meets the requirements of" the Act. 47 U.S.C. § 252(e)(6). In this case, we are asked to decide whether a number of provisions in the agreement between U S West and MCImetro violate the act.

This court has recently had occasion to decide several cases under the Telecommunications Act, and we then described the overall operation of the Act at greater length. See Pacific Bell v. Cook Telecom, Inc., 197 F.3d 1236, 1999 WL 1249707 (9th Cir. Dec. 27, 1999); U S West Communications v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999). One of the Act's principal ingredients is a regulatory framework for promoting competition in local telephone service. The Act prohibits state sanctioned monopolies, which previously governed the field. It contains various provisions aimed at facilitating entry by potential competitors. Ironically for a statute intended to promote competition, the Act creates two levels of regulatory control. The Federal Communications Commission is charged with the responsibility of promulgating regulations necessary to implement the Act itself, but the Act reserves to states the ability to impose additional requirements so long as the requirements are consistent with the Act and "further competition." See 47 U.S.C. § 251(d).

The Act labels all former local-phone service monopolists Incumbent Local Exchange Carriers ("ILECs").

In this case the ILEC is U S West. The new competitors are called Competing Local Exchange Carriers ("CLECs"). The CLEC in this case is MCImetro.

Section 251 of the Act imposes several direct requirements on an ILEC faced with potential competitive entry by a CLEC. It is of particular relevance to this appeal that ILECs must make key "network elements" available to CLECs on an "unbundled" basis at rates that are reasonable and non-discriminatory. See 47 U.S.C. § 251(c)(3). The Act defines a "network element" as follows: "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29).

The FCC by regulation lists certain network elements that must be made available by the ILECs. See 47 C.F.R. § 51.319. In deciding which network elements are subject to unbundled access, Congress has instructed the FCC to consider "whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

The Act does not, however, attempt to provide all the terms upon which ILECs must transact with CLECs. Rather, section 252 of the Act permits carriers to contract independently for interconnection and the provision of goods and services. The reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c). See 47 U.S.C. § 252(a)(1). If the carriers do not reach an independent agreement within a

specified period, the parties may petition the state agency responsible for regulating local telecommunications to arbitrate the open issues. If arbitration comes into play, then the resulting agreement must comply with section 251 of the Act and any FCC regulations promulgated under that section. See 47 U.S.C. § 252(c)(1). All interconnection agreements, whether reached independently or through arbitration, must be approved by the state agency (in this case, the WUTC). See 47 U.S.C. § 252(E)(1). The state agency may refuse to approve an independently negotiated agreement only if (1) the agreement or a provision thereof discriminates against a carrier not a party to the agreement, or (2) the agency finds that implementing the agreement or a provision thereof would be inconsistent with the public interest, convenience, and necessity. See 47 U.S.C. § 252(e)(2)(A). The state agency may refuse to approve an arbitrated agreement only if the agreement or a provision thereof fails to meet the requirements of section 251 of the Act or the FCC regulations promulgated under the Act. See 47 U.S.C. § 252(e)(2)(B).

Finally, the Act permits any party "aggrieved" by a determination made by a state agency under section 252 to "bring an action in an appropriate Federal district court to determine whether the agreement ... meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6). This language makes clear that review in federal court is restricted to the determination of whether the terms of the agreement violate any of the Act's requirements. This limited task is not always an easy one, however. "It would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction." AT & T v. Iowa Utils. Bd., 525 U.S. 366, 119 S.Ct. 721, 738, 142 L.Ed.2d 835 (1999).

We have jurisdiction of appeals from final judgments in these actions under 28 U.S.C. § 1291. Our review is de

novo. See MFS Intelenet, 193 F. 3d at 1117. To the extent that the statute requires factual findings to support the state agency's determination, those findings are reviewed for substantial evidence. GTE South, Inc. v. Morrison, 199 F.3d 733, 745-46 (4th Cir. 1999).

HISTORY OF THIS AGREEMENT AND THE EIGHTH CIRCUIT LITIGATION

The FCC promulgated its initial regulations under the Act in 1996. Under the Hobbs Act, the Federal Courts of Appeals have exclusive jurisdiction over challenges to FCC regulations. See 28 U.S.C. § 2342; 47 U.S.C. § 402(a). Several parties filed petitions for review of the FCC regulations in several different circuits. When agency regulations are challenged in more than one court of appeals, 28 U. S. C. § 2112 requires that the panel on multidistrict litigation consolidate the petitions and assign them to a single circuit. The panel assigned the challenges to the FCC regulations to the Eighth Circuit, which thereby became, and remains, "the sole forum for addressing . . . the validity of the FCC's rules." GTE South, 199 F.3d at 743. Therefore, the subsequent history of the Eighth Circuit litigation, Iowa Utilities Board v. FCC, has punctuated the history of this agreement and litigation.

On March 26, 1996, MCImetro requested interconnection negotiations with U S West. On August 30, when the parties could not come to agreement on a number of issues, MCImetro petitioned for arbitration before a WUTC arbitrator.

On October 15, 1996, approximately a month before the WUTC arbitrator was to hold a hearing on the interconnection agreement between MCImetro and U.S. West, the Eighth Circuit stayed the effectiveness of several FCC rules on the ground that the FCC may have not had jurisdiction to issue them. Thus, when the WUTC arbitrator held the hearing in late November and issued his report in

December of 1996, some of the rules had been stayed, but no decision on the merits had been issued. On July 18, 1997, after the parties in this case had completed the arbitration and mediation process, the Eighth Circuit issued a decision on the merits. See Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir.1997). The Eighth Circuit vacated all of the rules that it had previously stayed, along with several others. On that very day, MCImetro and U S West filed with the WUTC their final statements of position as to the remaining terms in dispute.

Because a state agency has only 30 days to approve an arbitrated agreement, the WUTC entered its order approving the agreement between MCImetro and U S West and modifying the arbitrator's recommendations in some respects on August 18, 1997. The WUTC said it had not had sufficient time to consider the Eighth Circuit's decision and therefore did not address its effect on the agreement.

In September 1997, U S West and MCImetro each filed suit in the Western District of Washington seeking review of WUTC's approval and modification of the agreement. The district court issued its decision on July 22, 1998, while the Eighth Circuit's decision in Iowa Utilities Board was still in effect. Relying on that decision, the district court struck some provisions from the agreement, reasoning that as a result of the Eighth Circuit's rulings the provisions no longer met the requirements of the Act.

Both parties promptly appealed the district court's decision to this court. While this appeal was being briefed, the Supreme Court granted certiorari in Iowa Utilities Board and handed down its decision. See AT & T v. Iowa Utils. Bd. The Supreme Court reversed the Eighth Circuit in many respects, and reinstated all but one of the previously vacated regulations. We asked for supplemental briefing on the Supreme Court's decision.

We now turn to the substance of the appeal.

PROVISION PROHIBITING U S WEST FROM SEPARATING ALREADY COMBINED NETWORK ELEMENTS

As approved by the WUTC, the agreement contained a provision requiring U S West to refrain from separating already combined network elements before providing them to MCImetro. FCC Rule 315(b) was in effect when the agreement was arbitrated and mandated such a provision. The Eighth Circuit's Iowa Utilities Board decision invalidated Rule 315(b), concluding that it was inconsistent with the meaning of the Act. See Iowa Utils. Bd., 120 F.3d at 813. The district court in this case held that under the Eighth Circuit's reasoning, the presence of the provision in the agreement could no longer be said to meet the requirements of the Act. The district court accordingly struck the provision from the agreement. The Supreme Court has since reversed the Eighth Circuit and reinstated Rule 315(b). See Iowa Utils. Bd., 119 S.Ct. at 737. We must therefore reverse the district court and order the provision restored to the agreement.

COMBINING SEPARATE NETWORK ELEMENTS AT MCIMETRO'S REQUEST

In addition to requiring that U S West refrain from separating already combined network elements, the agreement requires U S West to combine otherwise separate elements upon MClmetro's request. This provision was mandated by FCC Rules 315(c)-(f) at the time of arbitration. The Eighth Circuit invalidated Rules 315(c)-(f) using the same rationale it employed to invalidate Rule 315(b). That is, the Eighth Circuit concluded that requiring combination was inconsistent with the meaning of the Act because the Act calls for "unbundled" access. See Iowa Utils. Bd., 120 F.3d at 813. The district court once again followed the Eighth Circuit's reasoning and struck the combination provision from the agreement.

Unlike its decision with regard to Rule 315(b), however, the Eighth Circuit's decision with regard to Rules 315(c)-(f) was not before the Supreme Court. The Court's holding concerning Rule 315(b), however, confirms that the Eighth Circuit's interpretation of the Act was incorrect. The Court firmly stated that the Act's mention of "unbundled access" does not even "'remotely imply" that elements must be provided only in uncombined form and never in combined form. Iowa Utils. Bd., 119 S.Ct. at 737. The Eighth Circuit's decision to vacate the FCC regulation certainly still stands, and is immune under the Hobbs Act from collateral attack. See 28 U.S.C. § 2342; MFS Intelenet, 193 F.3d at 1120. All this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination. Our task is to determine whether such a provision "meets the requirements" of the Act, i.e., to decide whether a provision requiring combination violates the Act. The Supreme Court's interpretation of the Act makes absolutely clear that it does not, and we have already so held. See MFS Intelenet, 193 F.3d at 1121. The district court's invalidation of this provision must be reversed as well so that the original provision is restored to the agreement.

DARK FIBER

The agreement contains a provision requiring U S West to provide MCImetro with dark fiber on an unbundled basis. Dark fiber is fiber optic cable laid in the ground but not yet activated for use. The FCC's original "network elements" rule did not mandate unbundled access to dark fiber, but the district court held that an interconnection agreement provision requiring such access did not violate the Act. The district court's conclusion has since been solidified by the FCC's new rule, which treats dark fiber as a network element and therefore mandates U S West to provide competitors with access to it. See 47 C.F.R. § 51.319(a)(1). Because unbundled access to dark fiber is now not only consistent

with the Act but affirmatively required by it, we affirm the district court on this issue.

CO-LOCATION OF REMOTE SWITCHING UNITS

U S West also challenges a provision of the agreement requiring U S West to allow MCImetro to co-locate remote switching units ("RSUs"). "Co-location" refers to an ILEC's obligation under the statute to permit CLECs to install equipment on the ILEC's property in order to connect to the ILEC's existing network. Section 251(c)(6) of the Act imposes upon ILECs a duty to provide for "physical co-location of equipment necessary for interconnection or access to unbundled network elements on the premises of the local exchange carrier." The WUTC employed the FCC's definition of "necessary" as anything "useful" for interconnection, and concluded that RSUs fit the bill. The WUTC therefore added a provision to the agreement requiring U S West to permit co- location of RSUs. The district court held that the provision did not violate the Act and refused to strike it from the agreement.

U S West argues that we must strike the provision because the WUTC relied on the FCC's interpretation of the word "necessary," an interpretation with which the Supreme Court has found fault. See Iowa Utils. Bd., 119 S.Ct. at 735. Were we reviewing this agreement under the judicial review standards of the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., we might agree with U S West that the agency's use of an improper definition of "necessary" requires us to return the agreement to the agency for reconsideration. The APA requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C.§ 706.

We are not reviewing the actions of a federal agency subject to the APA, however. Here, our task is not to examine possible flaws in the WUTC's decision-making process, but to decide whether a provision resulting from that process-the provision requiring co-location-has resulted in an agreement that fails to "meet the requirements" of the Telecommunications Act. 47 U.S.C. § 252(e)(6). Although the Act may not require the provision, it certainly does not proscribe it. Sections 251 and 252 of the Act are designed to provide some flexibility in fixing the provisions of interconnection agreements. Hence, we conclude that the provision is valid and affirm the district court.

SHARED TRANSPORT

Shared transport refers to cable that connects facilities owned by different parties. The agreement did not require U S West to provide MCImetro with unbundled access to shared transport, despite an FCC rule mandating such access. Relying on the FCC rule, the district court held that because the agreement failed to include a provision requiring unbundled access to shared transport, the agreement in that respect failed to meet the requirements of the Act.

Subsequent to the district court's decision, the Supreme Court vacated the rule in question. The Court held that in promulgating the rule, the FCC had construed too permissively the congressional requirement that elements should only be subject to unbundled access if "necessary" and if lack of access to them would "impair" a competing carrier from providing services. See 119 S.Ct. at 736.

The FCC has now promulgated a new network elements rule, this time taking into account the Supreme Court's directives in Iowa Utils. Bd. Once again, the regulations require unbundled access to shared transport, though under limited circumstances. See 47 C.F.R. § 51.319(d)(1)(C). Apparently, shared transport is now required only when ILECs are also providing local circuit switching. See In the

Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order, FCC 99-238 (Nov. 5, 1999) at ¶ 369 ("[W]here an incumbent LEC provides requesting carriers with access to unbundled switching, we require incumbent LECs also to provide access to unbundled shared transport services.").

Because the present rule is narrower than the rule relied upon by the district court, we reverse the district court's decision. We remand so that the district court may consider whether to order a new provision or direct the parties to return to the WUTC in light of the special local considerations that may be relevant.

BILL AND KEEP

The Telecommunications Act requires that interconnecting ILECs and CLECs compensate each other for the cost of one party's transport and termination of traffic originating on the other party's network. See 47 U.S.C. § 251(b)(5). Before the WUTC arbitrator, MCImetro proposed and U S West opposed a method known as "bill and keep," a sort of rough justice approach under which the parties simply assume that for every U S West customer for whom MCImetro must pay transport and termination costs there will be an MCImetro customer for whom U S West must do likewise. The parties therefore just bill their own customers for traffic on their own networks and keep all of that revenue rather than making regular and presumably roughly equal exchanges of transport and termination costs. The arbitrator heard evidence from both sides, and decided to adopt the MCImetro bill and keep proposal, a decision that the WUTC approved and the district court upheld as consistent with the Act.

Section 251(b)(5) of the Act imposes upon ILECs a duty to establish reciprocal compensation arrangements, and section 252(d)(2)(A) provides that state agencies cannot find

a reciprocal compensation arrangement "just and reasonable" under the Act unless it provides for "the mutual and reciprocal recovery by each carrier" of transport and termination costs and "determines such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." Section 252(d)(2)(B) states, however, that the Act "shall not be construed ... to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery such as bill-and-keep arrangements." (Parentheses omitted.) The Act therefore does not preclude arrangements such as the one contained in the agreement between U S West and MCImetro.

U S West argues, however, that it presented sufficient evidence in this case to demonstrate that its cost of transporting and terminating MCImetro calls so exceed MCImetro's costs so that bill and keep is neither just nor reasonable in these circumstances and therefore violates the Act. U S West assigns error to the arbitrator's use of a presumption that calls between carriers will be in balance, arguing that the presumption is contained in one of the FCC rules the Eighth Circuit stayed before it ruled on the merits in Iowa Utilities Board and was therefore technically not in effect at the time the arbitrator made his decision. The rule (since reinstated by the Supreme Court) simply provides that "[n]othing in this section precludes a state commission from presuming" that traffic is in balance. 47 C.F.R. § 51.713(c). It does not require the presumption, but rather clarifies that such a presumption is not foreclosed by the FCC's own regulations.

As the arbitrator explained, the WUTC has a general policy favoring bill and keep arrangements. Because we are dealing with a new competitive relationship, the evidence on actual costs contained in the record consists only of speculation on the part of U S West and the statement from a

WUTC official, reasonable at least on its face, that costs will be equal even if traffic volume is out of balance as long as individual customers make about as many calls as they receive. Given the impossibility of more concrete data, and Congress's generally permissive attitude toward bill and keep arrangements as expressed in the Act, the arbitrator's decision to impose the system does not violate the Act as a matter of law and is sufficiently supported by substantial evidence.

UP FRONT CONSTRUCTION CHARGES

The agreement requires U S West to undertake construction if necessary to meet MCImetro's interconnection requests. U S West does not contest the substance of this provision, but argues that the fact that the agreement does not require MCImetro to pay its construction charges up front rather than after construction is completed violates the Act. The district court rejected this argument and upheld this provision of the agreement.

U S West's sole argument rests on the Eighth Circuit's decision to vacate an FCC rule requiring an ILEC to provide CLECs with interconnection at levels of quality superior to those at which the ILEC provides the same services to itself. See Iowa Utils. Bd., 120 F.3d at 812. The Eighth Circuit held that the Act merely requires equal quality. Id. This holding about quality of service is not relevant to the question of when construction costs are to be paid. U S West cannot point to any provision of the Act or FCC regulations that states or even implies that construction costs must be paid up front. We therefore affirm the district court's decision to uphold the agreement's construction provision as approved by the WUTC.

OBJECTIVE PERFORMANCE STANDARDS

The agreement currently requires U S West to provide services to MCImetro as quickly as U S West provides them to itself. MCI wants the agreement to contain "objective

performance standards," or, in other words, hard numbers on these time limits. MCI wants the agreement to state in exactly how many days U S West must provide a particular service. MCI suggests that the WUTC was required to include objective performance standards by an FCC rule to that effect.

MCI actually is referring to language in the FCC's First Report and Order, which is not itself an FCC "rule." The Order explains why the FCC chose to promulgate the rules it did, and why it accepted the arguments of some commenters and rejected those of others. With regard to the issue of nondiscriminatory access to unbundled network elements and just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements, the Order focused on two questions: (1) should the FCC promulgate any national rules at all, and (2) if so, what should those rules be?

In a section titled "Comments," the FCC put forth the positions of the various commenters on these two issues. Regarding the second issue, the Order mentions that during the notice and comment period MCI argued that the FCC "should adopt specific standards, including time limits, for implementation of requests for unbundled elements." In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, FCC 96-325 (Aug. 8, 1996) at ¶ 300. ("First Report and Order"). The Order goes on to state that a "number of incumbents, including Bell Atlantic, SBC, GVNW, and NYNEX, contend that we should not set specific rules, including time limits, for installation, service, maintenance and repair because incumbent LECs have different operational and administrative systems, and are subject to different state standards." Id. at ¶ 301.

In a section titled "Discussion," the FCC explained that it had decided to reject the suggestion to promulgate no national rules at all. Instead, the FCC adopted "general,

national rules defining 'nondiscriminatory access' to unbundled network elements, and 'just, reasonable, and nondiscriminatory' terms and conditions for the provision of such elements." First Report and Order at ¶ 308. The FCC indicated that the general rules would "rely" on the states to develop more specific ones "in arbitrations and other state proceedings" because states were better situated to do so. Id. at 310. The FCC further stated: "We expect that the states will implement the general nondiscrimination rules set forth herein by adopting, inter alia, specific rules determining the timing in which incumbent LECs must provision certain elements...." Id.

This language in the Order demonstrates that the FCC hoped (or "expected") that the states would adopt specific rules. Neither the Act nor any FCC rule affirmatively requires states to do so, however. The FCC might have wanted the WUTC to impose more specific requirements, such as objective performance standards, on an incumbent like U S West, but again, our review seeks to determine solely whether the lack of those requirements violates the Act. In the absence of an FCC rule, the law does not require them.

CONCLUSION

We affirm the district court's decision with respect to the following: (1) the validity of the provision requiring unbundled access to dark fiber, (2) the validity of the provision requiring co-location of RSUs, (3) the validity of the provision imposing the bill and keep method of reciprocal compensation, (4) the refusal to add to the agreement a provision requiring MCImetro to pay its construction charges up front, and (5) the validity of the agreement's failure to include "objective" performance standards.

We reverse the district court's decision with respect to the following: (1) the validity of the provision prohibiting U S West from separating already-combined network elements,

(2) the validity of the provision requiring U S West to combine network elements at MCImetro's request, and (3) the addition of a provision requiring unbundled access to shared transport.

The overall result is that the original agreement between U S West and MCImetro has been restored in all respects with the possible exception of shared transport. We remand the issue of shared transport for further consideration.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Each party should bear its own costs.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35789
D.C. No. CV-97-01320-BJR

U S WEST COMMUNICATIONS, INC.,
Plaintiff-Appellee,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Defendant-Appellant.

No. 98-35828
D.C. No. CV-97-01320-BJR

U S WEST COMMUNICATIONS, INC.,
Plaintiff-Appellee/Cross-Appellant,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Defendant-Appellant/Cross-Appellee,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; ANNE LEVINSON, Chairperson;

RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner,

Defendants-Appellees.

No. 98-35829
D.C. No. CV-97-01320-BJR

U S WEST COMMUNICATIONS, INC.,

Plaintiff-Appellant/Cross-Appellee,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,

Defendant,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; ANNE LEVINSON, Chairperson; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner,

Defendants-Appellees/Cross-Appellants.

MEMORANDUM[1]

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, Chief District Judge, Presiding

Argued and Submitted October 7, 1999
San Francisco, California

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Before: GOODWIN, SCHROEDER, and GRABER, Circuit Judges.

U S West Communications, Inc., AT&T Communications of the Pacific Northwest, Inc., and the Washington Utilities and Transportation Commission all appeal an order granting in part and denying in part cross-motions for summary judgment. U S West and AT&T both challenge an interconnection agreement approved and modified by the WUTC pursuant to the Telecommunications Act of 1996. All of the issues in these appeals are addressed in our opinion in *MCI Telecommunications Corp. v. U.S. West Communications*, Nos. 98-35819 and 98-35820.

The district court correctly upheld the provisions relating to dark fiber, co-location of remote switching units, bill and keep, and time of payment for construction charges. We affirm its decision on these provisions. The district court also should have upheld the provisions relating to separating and combining network elements, and we reverse its decision on those provisions. For the reasons stated in our *MCI* opinion, we reverse and remand the shared transport issue for further consideration.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35821
D.C. No. CV-97-01764-BJR

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff-Appellee,

v.

SPRINT COMMUNICATIONS COMPANY L.P. ("SPRINT"), a limited partnership,

Defendant-Appellant,

and

ANNE LEVINSON, Chairwoman; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner, in their official capacities as Commissioners of the Washington Utilities & Transportation Commission; WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Defendants.

No. 98-35823
D.C. No. CV-97-01764-BJR

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff-Appellee,

v.

SPRINT COMMUNICATIONS COMPANY L.P. ("SPRINT"), a limited partnership, ANNE LEVINSON, Chairwoman; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner, in their official capacities as Commissioners of the Washington Utilities & Transportation Commission;

Defendants,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Defendant-Appellant.

MEMORANDUM

Appeal from the United States District Court
for the Western District of Washington
Barbara I Rothstein, Chief District Judge, Presiding

Argued and Submitted October 7, 1999
San Francisco, California

Before: GOODWIN, SCHROEDER, and GRABER, Circuit Judges.

Sprint Communications, Inc. and the Washington Utilities and Transportation Commission both appeal an order of summary judgment in favor of U S West Communications, Inc. regarding an interconnection agreement approved by the WUTC pursuant to the Telecommunications Act of 1996. Only two aspects of the district court's decision are challenged on appeal. Both issues are addressed in our opinion in *MCI*

Telecommunications Corp. v. U.S. West Communications, Nos. 98-35819 and 98-35820.

The district court should have upheld the provisions relating to separating and combining network elements. We reverse its decision on these provisions so that the district court can reinstate them.

REVERSED AND REMANDED.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C97-1508R
(Consolidated)

MCI TELECOMMUNICATIONS CORP., et al.,

Plaintiffs,

v.

U S WEST COMMUNICATIONS, INC., et al.,

Defendants.

ORDER GRANTING IN PART AND
DENYING IN PART CROSS-MOTIONS
FOR SUMMARY JUDGMENT

MCI Telecommunications Corp. and MCI Metro Access Transmission Services, Inc. ("MCI")brought this action pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission ("WUTC") concerning interconnection between MCI and U S West Communications, Inc. ("U S West"). MCI seeks to compete in the local telecommunications market. The defendants are U S West and the WUTC and its commissioners. The FCC has filed a brief amicus curiae.

All parties have moved for summary judgment. U S West asserts that certain terms of the agreement are inconsistent with Sections 251 and 252 of the Act, with Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert.

granted, AT&T v. Iowa Utilities Bd., 118 S. Ct. 879 (1998), and with FCC regulations. MCI says that the agreement should have provided for: "shared transport" as an unbundled network element; nondiscriminatory access to OSS; deaveraged rates for unbundled network elements; performance standards and noncompliance compensation credits; and no nonrecurring charges.

The court has fully considered all the papers filed. Because there is no genuine issue of material fact for trial, the case will be decided as a matter of law pursuant to Federal Rule of Civil Procedure 56.[1]

I. BACKGROUND

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of Title 47, United States Code), was "designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local telephone service . . . to facilitate the entry of competing companies into local telephone service markets across the country." Iowa Utilities Bd., 120 F.3d at 791. Specifically, the Act forces an incumbent local exchange carrier ("ILEC") (1) to permit new entrants to interconnect with the ILEC's existing network (interconnection) ; (2) to provide entrants access to the

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[1] The court finds it unnecessary to hear oral argument due to the clarity of briefing, sufficiency of the record, and the similarity of most issues to cases decided by other courts.

This case contains many issues substantially similar or identical to two other cases involving U S West and the WUTC: U S West Communications, Inc. v. AT&T Communications of the Northwest, Inc., No. 97-1320R (consolidated); and U S West v. Sprint Communications Co., No. 97-1764R. As a result, U S West and the WUTC each filed consolidated briefs for all three cases, and U S West's competitors collaborated on a single brief regarding standard and scope of review. The court has issued separate orders in the AT&T and Sprint cases contemporaneously with this one.

ILEC's individual "network elements" on an unbundled basis (unbundled access) ; and (3) to sell to entrants at a wholesale rate any telecommunications service that the ILEC offers at retail to its own customers, so that the new entrant can resell it (resale). 47 U.S.C. §§ 251-52.

The Act creates a multi-step process through which entrants to the local telephone market ("competing local exchange carriers" or "CLECs") gain use of the ILEC's network and services. First, both parties must negotiate. 47 U.S.C. §§ 251(c)(1), 252(a)(1). If negotiations stall, either party may petition the state utility commission for arbitration on the unresolved issues. Under the WUTC's procedure, when an impasse is reached, the arbitrator employs a modified "final offer" system: she will choose between the parties' last proposals; if they both conflict with the Act or WUTC policy, she will make a decision consistent with these requirements. Any final agreement, whether reached voluntarily or through arbitration, must be approved by the state commission. 47 U.S.C. § 252(e)(1).

MCI and U S West seek review of their final agreement under 47 U.S.C. § 252 (e)(6).[2]

II. SCOPE AND STANDARD OF REVIEW

As to scope of review under 47 U.S.C. § 252(e)(6), the court confines consideration to the administrative record and will not hold a de novo proceeding. See United States v. Bianchi & Co., Inc., 373 U.S. 709, 715 (1963); see, e.g., GTE South Inc. v. Morrison, No. 3:97CV493, slip op. at 6-7 (E.D. Va. May 19, 1998); TCG Seattle, slip op. at 3.

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[2] Review of this final agreement extends necessarily to the underlying orders made by the WUTC throughout the arbitration period that became part of the agreement. See U S West Communications, Inc. v. TCG Seattle, No. C97-354WD, slip op. at 3 (W.D. Wash. Jan. 22, 1998) [hereinafter "TCG Seattle"].

As to the standard of review, the parties agree that a state agency's legal interpretation of the Telecommunications Act is reviewed de novo. See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997). This interpretation is not due deference as is a federal agency's under Chevron U.S.A. Inc. v. Natural Resources Defense Counsel Inc., 467 U.S. 837, 843 (1984), because a state agency lacks the impetus, expertise and capability to harmonize federal law that a federal agency has. See Orthopaedic Hosp., 103 F.3d at 1495-96.

The WUTC's factual findings, however, will be reviewed as to whether they are arbitrary or capricious. See MCIMetro Access. Transmission Services, Inc. v. GTE Northwest, Inc., No. C97 742WD, slip op. at 4 (W.D. Wash. July 7, 1998) [hereinafter GTE Northwest]. The Act authorizes the state commissions to hear evidence and set rates and schedules, subject to district court review of whether they have complied with the Act and FCC pronouncements. See 47 U.S.C. § 252(b)-(e); Iowa Utilities Bd., 120 F.3d at 806.

If the district court finds invalid an aspect of the agreement, it will strike that portion and remand to the state commission for renegotiation. See AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 5:97-CV-405-BR, slip op. at 15-16 (E.D.N.C. May 22, 1998) [hereinafter "AT&T v. BellSouth"].

III. U S WEST'S CLAIMS

A. Combining Unbundled Elements

Prices for unbundled access are "'cost-based." 47 U.S.C. §§ 251(c)(3), 252(d)(1). Prices for resold services are "on the basis of retail rates charged to subscribers for the telecommunications service," minus the cost avoided by the ILEC of selling the service wholesale ("wholesale"). 47 U.S.C. § 252(d)(3). U S West argues that the MCI

agreement violated the Act by requiring it to combine unbundled network elements for sale at a "cost-based" price rather than at a "wholesale" price."[3] It is correct.

The Act provides: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). The Eighth Circuit interpreted this sentence to mean that "requesting carriers will combine the unbundled elements themselves." Iowa Utilities Bd., 120 F.3d at 813. That is, while the Act requires ILECs to provide unbundled elements to CLECs, it could not be read "to levy a duty on the incumbent LECs to do the actual combining of elements." Id. The court clarified:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services.

Id.

MCI contends that U S West waived any challenge to the combining provisions because it did not raise this

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[3] (See MCI Agreement, Att. 3 ¶¶ 11 2.4 ("U S West shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to its subscribers."), 2.5. ("Where U S West provides combined Network Elements at MCIm's direction, however, no demarcation point shall exist between such contiguous Network Elements.").)

particular argument before the WUTC. U S West's omission is immaterial. the arbitrator applied an FCC interpretation of the law that has since been repudiated. This court need not retrain from applying the current law.

MCI and the WUTC also argue that the court either lacks subject matter jurisdiction or should refrain from deciding this issue because U S West failed to exhaust the agreement's dispute resolution mechanism. Exhaustion of remedies is inapt here. First, the Act provides that "any party aggrieved" by a state commission's determination may bring a federal court action to determine whether an agreement contradicts the Act. The agreement's dispute resolution clause does not purport to deprive the court of this power, or purport to be a mandatory first step.

MCI maintains that the dispute resolution provision has not been triggered because of the Supreme Court's grant of certiorari of the Eighth Circuit decision. This court will follow the existing precedent set by Iowa Utilities and will not adopt a wait and see approach.

Substantively, MCI and the WUTC contend that Iowa Utilities constrained only the FCC's authority to require combining, leaving it open for state commissions to order combining of network elements based upon independent state grounds and their rate-setting authority. Iowa Utilities cannot be read so narrowly. According to Iowa Utilities, requiring ILECs, at cost based rates, to combine or not to separate already combined network elements violates the Act. See Iowa Utilities Bd., 120 F.3d at 813; see also GTE Northwest, slip op. at 7-8.

The court vacates the requirements that U S West combine/ restrain from separating network elements at cost-based rates, and remands to the WUTC to negotiate replacement language.

B. Reciprocal Access to Poles, Ducts, Conduits, and Rights-of-way

Section 251(b)(4) provides that all local exchange carriers have "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224." (emphasis added) U S West argues that because it is required to provide such access to MCI, but MCI is not required to provide similar access to it, the agreement violates the Act. This is incorrect if one examines the cross-referenced Section 224.

Section 224(f)(1) provides that "[a] utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Section 224(a)(5), however, provides that "[f]or the purposes of this section, the term 'telecommunications carrier . . . does not include any incumbent local exchange carrier as defined in Section 251(h)." U S West is an incumbent local exchange carrier as defined in Section 251(h); therefore, MCI is not obligated to provide reciprocal access to U S West.[4] The WUTC did not err.

C. Expanding Facilities.

U S West argues that certain provisions require it to provide superior quality access to MCI in violation of Section 251(c)(2)(C) because it must expand its facilities to accommodate competitors.[5] It also contends that the agreement improperly requires it to exercise eminent domain

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[4] The FCC, whose opinion was not relied upon here, agrees. See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC Docket No. 96-98, First Report and Order (August 8, 1996) ¶ 1231 [hereinafter FCC Order]. This paragraph was untouched by Iowa Utilities.

[5] The MCI agreement provides: "U S WEST shall take all reasonable steps to expand its facilities, which may include placement of taller poles or additional conduit, if necessary, to accommodate MCIm's request . . . ." (MCI Agreement, Part A ¶ 47.4.19.)

authority for the benefit of MCI.[6] Because all telecommunication providers can exercise eminent domain under Wash. Rev. Code 80.36.010, U S West argues that MCI should be required to expand its own rights-of-way. These assertions lack merit.

First, such expansion does not create superior quality access; it creates equivalent access. Because U S West can expand its capacity to suit its needs, "[t]he principle of nondiscrimination established by section 224(f) (1) requires that it do likewise for telecommunications carriers, ..." FCC Order ¶ 1162. The Eighth Circuit endorsed the FCC's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." Iowa Utilities, 120 F.3d at 813 n.33 (quoting FCC Order ¶ 198 (discussing technical feasibility)). The FCC declined to craft a rule categorically prescribing when a utility must expand an existing facility as requested versus when it may choose to decline due to infeasibility. FCC Order ¶ 1163. Nevertheless, it interpreted the Act "to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access." Id. The WUTC relied upon the language of these valid FCC statements in approving these provisions.

Second, U S West bases its argument regarding its inability to exercise eminent domain on an imprecise interpretation of the law. Under state law, all telecommunications carriers indeed can exercise eminent

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[6] U S West refers to language in the agreement that provides that it will exercise its eminent domain authority when necessary to expand an existing right-of-way over private property in order to accommodate a request for access to that right-of-way. (See MCI Agreement, Part A ¶ 47.4.4)

domain. What's important is whether a competing carrier can have access to U S West's right-of-way, and consequently, U S West's existing network.

This court agrees with the WUTC's conclusions.

D. Non-Reciprocal Reservation of Excess Capacity

U S West argues that it is forced to provide superior quality access because it must permit MCI to reserve excess space on its poles, ducts, conduits, and is prevented from reserving such space for its own future use beyond emergency or maintenance spare. U S West is incorrect.

These agreement provisions exist to prevent U S West from discriminating in favor of itself:

> Permitting an incumbent LEC . . . to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.

FCC Order ¶ 1170. The focus is on current use by MCI, rather than speculative future use by U S West. After a confirmed request for space is made, U S West must reserve it for ninety days, within which time MCI chooses whether to use or decline it. (MCI Agreement, Part A ¶ 47.4.10.) Quality is not the issue, parity is: the space either will be used or remain unused, not remain reserved for U S West indefinitely, unless safety dictates such a use.

The WUTC relied upon valid FCC proscriptions in approving these provisions.

E. Collocation of Remote Switching Equipment

U S West argues that the requirement that it collocate MCI's remote switching units (RSUs) in U S West's facilities violates the Act.[7] It is incorrect.

Section 251(c)(6) provides that U S West has "[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . ." The FCC defines "'necessary" as "used" or "useful," not "indispensable." FCC Order ¶ 579. Thus, transmission equipment may be collocated and state commissions may designate additional types of equipment to be collocated. FCC Order ¶ 580. The FCC held:

> At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements.

FCC Order ¶ 581 (emphasis added).

The WUTC here determined that RSUs are equipment necessary for interconnection or access to unbundled network

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[7] It refers to MCI Agreement, Part A ¶ 40.1.5. Collocation "enables a requesting telecommunications carrier to . . . [p]lace its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises." 41 C.F.R. § 51.5.

elements and that without RSUs CLECs would be at a technical and economic disadvantage in the transmission and routing of telephone service. (See In re Petition for Arbitration of an Interconnection Agreement Between MCImetro Access Services, Inc. and U S West Communications, Inc., WUTC, Commission Order Approving Interconnection Agreement, Docket No. UT-960310 (Aug. 18, 1997), at 5-6 [hereinafter "MCI Approval Order"].) The WUTC found that an RSU was not a "switch" under 47 C.F.R. 51.323(c) because an RSU requires a host to perform essential functions. (See id., at 5-6.) These determinations were neither arbitrary nor capricious, were based on sufficient evidence, and were within the WUTC's discretion to decide.

F. Unbundling of Dark Fiber

U S West challenges the requirement that it provide MCI with "dark fiber" as an unbundled network element. Dark fiber is "fiber-optic cable that has been laid into a telecommunications provider's network but which is not 'lit' by electronics on either end of the cable, or at least not by electronics provided by the local carrier. No switches are routing digital impulses onto this fiber and it consequently carries no information." MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., No. 5:97-CV-425-BR, slip op. at 6 (E.D.N.C. May 22, 1998) [hereinafter "MCI v. BellSouth"]. A "network element" is "a facility or equipment used in the provision of a telecommunications service," which includes "features, functions, and capabilities" provided by such facilities. 47 U.S.C. § 153(29). The FCC declined to address whether dark fiber should be unbundled as a network element because it lacked a sufficient record to decide. FCC Order ¶ 450. States may impose additional unbundling requirements so long as such requirements are consistent with the Act and FCC regulations. Id. at ¶ 244.

This is a two-step inquiry: (1) is dark fiber a network element; (2) if so, should it be unbundled? U S West argues first that "dark fiber" is not a network element because it is not actively "used" in the provision of telecommunications services. Alternatively, it argues that because dark fiber is proprietary, MCI must show a heightened need to use it. U S West's interprets "network element" too narrowly and has not shown that dark fiber should not be unbundled.

Dark fiber is a physical component that, if lit, undoubtedly would be a network element. The fiber is not on spools in a warehouse, it is already in the ground as part of a network, awaiting only an LEC's desire to attach the proper equipment. U S West's distinction is, therefore, purely temporal. It argues that "used" means only "currently used," not used in the sense of "employed for some purpose." Because the Act's does not specify a particular, technical definition of "used," such preciseness should not be implied.

In MCI v. BellSouth, slip op. at 6, the Eastern District of North Carolina found dark fiber to be a network element, vacating the state commission's order to the contrary. It relied on construing "network element" broadly, in the spirit of Iowa Utilities, and previous FCC language that dark fiber service was "wire communication."Id. at 6-9. Its reasoning is persuasive.

If a state commission determines that it is technically feasible for an ILEC to provide access to an unbundled network element, the commission may decline to require unbundling only if: (1) the network element is proprietary and the CLEC could provide the same service by using nonproprietary elements; or (2) failure to provide access "would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service" a CLEC seeks to offer. 47 C.F.R. § 51.317(b); see 47 U.S.C. § 251(c)(3), 251(d)(2). The burden is upon the ILEC to prove that an element is proprietary. FCC Order ¶ 283.

U S West argues for the first time that dark fiber is proprietary because revealing the existence of "dark fiber" shows its business plan for expansion. This argument is inapposite. Whether an element is proprietary is a factual, not a legal, question. U S West provided no evidence before the WUTC that dark fiber was proprietary and therefore never satisfied its burden of proof.

MCI, on the other hand, presented evidence that denying it access to dark fiber would decrease the quality and increase the cost of providing services. (See MCI Record, at 8921 (Testimony of Maria Mazullo).)

The WUTC did not err legally nor act arbitrarily or capriciously.

G. Pricing Claims

U S West contends that the WUTC approved prices, terms, and conditions that unjustly denied U S West adequate compensation.[8] The court reviews de novo whether the WUTC employed a methodology that, as a matter of law, violates the Act. The court reviews whether the WUTC's fact-finding, including choice of methodology, was arbitrary or capricious.

1. Unbundled Loop Prices

Simply stated, a local loop is the portion of the network that connects the customer with the network. The state commission determines whether the rates, terms, and conditions for such unbundled elements are just and reasonable. 47 U.S.C. §§ 251(c)(3), 252(d)(1). This determination is "based an the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element," must

[8] The prices set in the agreement and approved by the WUTC are interim prices: they are subject to change during the WUTC's generic price and cost proceeding.

be nondiscriminatory, and "may include a reasonable profit." 47 U.S.C. § 252(d)(1)(A).

The parties acknowledge that this means that price should be based on the forward-looking, i.e., incremental, costs of providing the element rather than on historic or embedded costs, and that the WUTC should, therefore, employ a TELRIC ("Total Element Long Run Incremental Cost") methodology. See FCC Order ¶ 678 (describing TELRIC). They disagree about which TELRIC model was better. The arbitrator accepted MCI's "Hatfield model," which produced a price of $11.33, and rejected U S West's independent cost study, which produced a price of $36.20.

The choice of the Hatfield model was neither legal error nor arbitrary or capricious. In a pre-Act proceeding, the WUTC approved an earlier version of the Hatfield model. See Washington Utilities and Transportation Comm'n v. U S West Communications, Inc., WUTC, Fifteenth Supplemental Order, Docket No. UT-950200, slip op. at 86 (April 11, 1996) [hereinafter "Fifteenth Supplemental Order"], aff'd, U S West Communications, Inc. v. Washington Utilities and Transportation Comm'n, 134 Wash. 2d 74 (1997). The FCC specified the Hatfield model as the kind of generic, forward-looking model that best comports with TELRIC principles. FCC Order ¶ 834.

The WUTC found U S West's proposed cost studies less reliable. While the Hatfield model used inputs consistent with inputs the commission had found to be reasonable, U S West's cost studies used unverifiable cost data, inputs that were inconsistent with the WUTC's rate order, and excessive allocation of costs that appeared to be an attempt to recover embedded costs. (See In re Petition for Arbitration of an Interconnection Agreement Between MCImetro Access Services, Inc. and U S West Communications, Inc., WUTC, Arbitrator's Report and Decision, Docket No. UT-960310 (Jan. 3, 1997), at 24-26 [hereinafter "First MCI Arbitration order"] (citing to prior WUTC proceedings).) The arbitrator

noted that U S West's price of $36.20 outstripped the figure in a prior Washington rate hearing ($8.96), U S West's own proposal for business service in that proceeding ($15.77), U S West's own loop cost calculations in that proceeding (less than $14.00), and U S West's proposed rates in prior filing ($16.83-$19.24). (See id.)

U S West argues nonetheless that the WUTC behaved arbitrarily and capriciously because it relied upon improper prices for inputs. In support, U S West points to the evidence that it presented to the arbitrator. This is an attack on the choice of the Hatfield model and an attempt to retry the facts.[9] While conflicting interpretations of the evidence exist, none of the arbitrator's choices were arbitrary or capricious.

2. Avoided Cost Discount

The Act provides that an ILEC must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A). U S West contends that it need not provide at wholesale rates those services that are offered to end users at a term or volume discount because this would constitute a double-discount. That is, prices are not retail" if already subject to a discount.

The FCC rejected this: "If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service." FCC order ¶ 951. Moreover, "restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification . . . . [S]uch restrictions should be considered presumptively unreasonable." Id. at 953. Any

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[9] Earlier, this court struck a U S West affidavit, the primary purpose of which was to criticize the Hatfield model. That the Hatfield model may be improving with time is no indication that the WUTC either chose it improperly or that the inputs should now be revised for this interim price proceeding.

possibility of a double discount is eliminated by permitting ILECs to prove that their avoided costs differ when selling large volumes. Id. The FCC has authority "to issue regulations regarding the incumbent LEC's duty not to prohibit, or impose unreasonable limitations on, the resale of telecommunications services." Iowa Utilities Bd., 120 F.3d at 819. The FCC's determinations here are valid and binding. The WUTC did not err in permitting a wholesale discount for all retail services.

3. One Point of Interconnection Per LATA

U S West challenges the WUTC's determination that MCI may establish a single point of interconnection ("POI") per Local Access Transport Area ("LATA"). U S West contends that the Act requires a CLEC to have a POI in each local calling area in which that CLEC offers local service and that the present plan compensates U S West inadequately. It is wrong.

Under the Act, a new entrant may interconnect with the ILEC's facilities "at any technically feasible point." 47 U.S.C. § 251(c)(2); see FCC Order ¶ 209. The ILEC is relieved of this duty to provide interconnection at a particular point only if it proves to the state commission that interconnection at that point is not technically feasible. 47 C.F.R. § 51.305(e). U S West does not contest that such a connection is technically feasible. The WUTC properly declined to consider the cost of a single POI per LATA because "[a] determination of technical feasibility does not include consideration of economic, accounting, [or] billing . . . concerns." 47 C.F.R. § 51.5; see U S West Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, slip op. at 9 (W.D. Wash. Jan. 7, 1998) (reaching same conclusion for same reasons) [hereinafter "MFS Intelenet"].

4. "Bill and Keep" Compensation

U S West contends that the interim "bill and keep" arrangement adopted by the WUTC in the MCI agreement violates the Act because it provides for inadequate cost recovery. It is wrong.

Compensation provisions must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of calls that originate on the other carrier's network facilities. 47 U.S.C. § 252(d)(2)(A)(i) An agreement may "afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." 47 U.S.C. § 252(d)(2)(B)(i). In an independent proceeding, the WUTC approved of bill and keep as a method of reciprocal compensation. See WUTC v. U S West Communications, Inc., WUTC, Fourth Supplemental Order, Docket No. 941464, slip op. at 29-32 (Oct. 31, 1995) [hereinafter "Fourth Supplemental Order"). Similarly, the FCC found that a state may impose a bill and keep arrangement when neither party can rebut the presumption that traffic between carriers is balanced. FCC Order ¶ 1111-13.

U S West never rebutted the presumption that traffic was not balanced with anything other than conclusory statements. (See MCI Record 3806-10, 3820-24, 8615.) In consideration of this, and that U S West's alternative was previously found to be inferior, see Fourth Supplemental Order, slip op. at 28, the WUTC did not act arbitrarily or capriciously by choosing bill and keep because it is consistent with the Act, WUTC policy, and FCC statements. See TCG Seattle, slip op. at 7 (approving bill and keep because permitted by Act, approved in independent WUTC proceeding, and approved by FCC).

5. Construction and Conditioning Charges an Local Loops

U S West challenges two aspects of the MCI agreement. It argues that: (1) U S West must "make changes to its

network facilities, services and operations to provide interconnection and unbundled elements" upon request, which means providing "superior services"; and (2) the WUTC failed to require MCI to pay conditioning charges for the local loop. Both contentions lack merit.

First, U S West improperly proposes that this is a "superior access" issue; this is a question of equivalent access for resale services. U S West is providing MCI no more than it provides itself: local loop for an end user. MCI must pay for construction the same charges that apply to a similarly situated U S West retail end user pursuant to U S West's retail tariffs. (See MCI Agreement, Att. 1, at ¶ 3.1.) Modification of an ILEC's facilities to accommodate interconnection or access to network facilities, as is required here, is contemplated by the Act. See Iowa Utilities Bd., 120 F.3d at 813 n.33.

Second, the WUTC did not act arbitrarily or capriciously when it rejected conditioning costs for local loops. In both cases, U S West provided no evidence that the cost of conditioning wasn't already included in the TELRIC price of a conditioned loop. (See First MCI Arbitration Decision, at 54.) As in U S West Communications v. TCG Seattle, "U S West presented no evidence of the actual costs of making changes to its network. . . .The arbitrator noted that U S West did not state in its proposal what is involved in conditioning, why a charge is needed, or how much the charge should be." TCG Seattle, slip op. at 6.

H. Compensation for Interim Number Portability

Number portability enables users who switch telephone companies to retain the same telephone number. See 47 U.S.C. § 153(30). Until a permanent number portability system is developed, an ILEC must provide number portability using interim methods. U S West uses "remote call forwarding," in which a call to a competitor's customer

dialed to the customer's old U S West number will be switched and forwarded to the competitor's number.

The Act provides that the costs of establishing number portability "'shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC]." 47 U.S.C. § 251(e)(2) (emphasis added). U S West contends that the MCI agreement fails to compensate it for the costs of providing interim number portability. It is incorrect because the agreement is consistent with the Act and with binding FCC orders.

U S West says that the WUTC erred by allocating the costs of number portability in the MCI agreement based on the amount of active local numbers each carrier has rather than on the number !of calls actually forwarded. The FCC explicitly authorized allocation of cost recovery based on the number of active lines. Telephone Number Portability, First Report and Order and Further Notice Of Proposed Rulemaking, 11 F.C.C.R. 8352, at ¶ 136 (1996). It specifically rejected the kind of plan proposed by U S West because it would impose the full cost of number portability on new entrants. Id. at ¶ 138; see also TCG Seattle, slip op. at 9 (rejecting same U S West contentions).

I. Requirements Imposed Upon U S West Dex

U S West Dex ("Dex") and U S West Communications, Inc. (the party here), are each wholly owned subsidiaries of U S West, Inc. ("Parent"). Dex is the publishing branch of the parent, and publishes U S West's white and yellow page directories; it is not party to the MCI agreement. Nevertheless, the MCI agreement provides:

> For white pages and yellow pages advertising, U S West shall ensure that (a) U S WEST's directory publisher sell such advertising on a nondiscriminatory basis to MCI[] Customers, and (b) charges for such advertising will be billed by U S WEST's directory publisher in the

> same manner as it bills for U S WEST's customers' advertisements.

(MCI Agreement, Att. 5, at ¶ 7.1.12.)

U S West contends that the MCI agreement imposes requirements on Dex that are beyond the scope of the Act and the WUTC's authority. MCI and the WUTC argue that because U S West and Dex are sister corporations under the real control of the Parent, such requirements are proper. U S West is correct.

U S West, as a utility, is regulated by the WUTC; Dex, as a publisher/advertiser, is not. See U S West, Inc. v. Nelson, No. 97-35551, slip op. at 6027, 6034 (9th Cir. June 16, 1998). The Ninth Circuit explained:

> This regulatory loophole might encourage [the Parent] to attribute its costs to the regulated [U S West], while shifting its profits to the unregulated [Dex]. To correct for this and other similar incentives, the [WUTC] has developed several accounting practices of its own. One of these practices, imputation, involves adjusting the revenue requirement of the regulated affiliate to realize portions of the cost savings . . . that the affiliated family--regulated or not--has experienced as a whole.

Id. This does not mean, however, that the scope of regulations has expanded. The WUTC exercises the power to impute Dex's income to U S West through its regulatory power over rates: "The [WUTC] exercises no jurisdiction over advertising . . . . Only the utility is regulated or affected, pursuant to statutory and Constitutional authority." Fifteenth Supplemental Order, slip op. at 35 (emphasis added).

The Act provides that all telecommunications carriers have the duty to provide nondiscriminatory access to

directory listing. 47 U.S.C. § 251(b)(3). This imposes no new requirements on nonregulated entities, such as Dex; it codifies the pre-existing policy rationale that directory listing is essential to telecommunications. In a pre-Act proceeding, the WUTC discussed listing issues, distinguishing between U S West and its directory publisher. See Fourth Supplemental Order, slip op. at 56-57. It required U S West to: (1) include in its database all listings of subscribers submitted to them by companies serving the same area; (2) provide the same database to the company's directory publishing subsidiaries and other directory publishers; (3) provide simple listings in the published directories; and (4) provide this service with no additional charge. Id. at 57.

The MCI arbitrator recommended that the parties conform both to the Fourth Supplemental Order and the AT&T agreement.[10] The MCI agreement provision goes further than that. The Fourth Supplemental Order and the AT&T agreement required U S West to control functions over which it had power; essentially, U S West was to collect its competitors' listings with its own and have the entire list published by Dex. In contrast, the MCI agreement forces U S West to set the terms and monitor a contract between (a) Dex and (b) MCI's customers, though neither is a party to the MCI agreement.

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[10] The AT&T agreement's arbitrated clause provides:

> The publication of directories, Directory Listings, directory databases and associated related services shall be governed by the terms and conditions contained within [the Fourth Supplemental Order]. To the extent not inconsistent therewith, the following Section 44 shall apply.

AT&T Agreement, Part A ¶ 44. Section 44 contains negotiated language in which U S West provides, inter alia, that the master directory listing will include AT&T customers and that AT&T customers will receive the same courtesy listings that U S West provides to its own customers.

The WUTC had no authority to force U S West to regulate Dex. MCI Agreement, Att. 5, at ¶ 7.1.12, is struck and remanded to the WUTC to negotiate replacement language.

J. Due Process

U S West contends that the WUTC violated its due process rights because its decisions were not based on evidence in the record. The record refutes this contention.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Matthews v. Eldridge, 424 U.S. 319, 333 (1976). This was provided here. If the WUTC made errors, the errors were legal and not of constitutional magnitude. All its determinations were based on adequate evidence and none of its decisions on U S West's claims were arbitrary or capricious. See TCG Seattle, at 10 (denying U S West's due process claim).

K. Taking

U S West argues that the WUTC's approval of the agreement amounts to an unconstitutional taking. As Judge Dwyer noted:

> A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985).

TCG Seattle, slip op. at 10. These requirements have not been met here. U S West's taking claim is dismissed without prejudice.

Because this claim seems identical to the ones disposed of in GTE Northwest, TCG Seattle, and MFS Intelenet, U S

West now argues that it is not seeking compensation for a taking; it is seeking declaratory and injunctive relief to prevent a taking, "to demonstrate that its property may not be invaded and that it may not be required to provide access to its property on a below-cost basis." (U S West Motion for Summary Judgment, at 81.) This is circular. The Fifth Amendment says that property cannot be taken "without just compensation." U S West's claim is still not ripe because the WUTC has not set permanent prices and U S West has not sought compensation in state court. Moreover, the court has found none of the interim price determinations to be arbitrary or capricious.

IV. MCI'S CLAIMS

A. Shared Transport

MCI contends that the Act requires that "shared transport" be offered as an unbundled network element. 'Shared transport" is a function performed by interoffice transmission facilities in an ILEC's network. It seeks to share (with other CLECs and U S West) the capacity to transport calls between two U S West end offices directly, rather than having the calls routed through an extra "tandem" switch, or purchasing more costly "dedicated transport.

As mentioned earlier, a "network element" includes features, functions, and capabilities of any facilities that are used to provide telephone service. 47 U.S.C. §§ 153(29). The FCC is authorized to determine what network elements must be unbundled. 47 U.S.C. § 251(d)(2); see Iowa Utilities Bd., 120 F.3d at 802 n.23. It determined that network elements include shared transport. FCC Order ¶ 440-41. These FCC determinations were untouched by the Eighth Circuit. See Iowa Utilities Bd., 120 F.3d at 808-810, 818 n.38.

The FCC regulations define "shared transport" as "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches,

between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." 47 C.F.R. § 51.319(d)(1)(ii). This description was clarified by another FCC order: "[T]he obligation of incumbent LECs to provide requesting carriers with access to shared transport extends to all incumbent LEC interoffice transport facilities, and not just to interoffice facilities between an end office and a tandem." In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 12 F.C.C.R. 12460 (Aug. 18, 1997), at ¶ 25.

The WUTC did not permit MCI access to shared transport because it thought that "shared transport" was a service rather than a network element. (See MCI Approval Order, at 13-14.) That reasoning was flawed. Capabilities may be offered simultaneously as services or unbundled elements. Iowa Utilities Bd., 120 F.3d at 809.

The WUTC and U S West argue that because MCI sought shared transport only in post-arbitration proceedings, it should be procedurally barred from seeking it now. They argue that it should instead use the agreement's Bona Fide Request for Further Unbundling (BFR) process. This is incorrect. No procedural bar exists because the question is legal, not factual: is shared transport a network element subject to unbundling? The court concludes that it is. The BFR process provides an alternative process by which MCI may gain additional, not-yet-specified elements.

B. Nondiscriminatory Access to OSS

"Operations support systems ["OSS"] functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information." 47 C.F.R. § 51.319(f)(1). An ILEC must provide nondiscriminatory access to OSS as an unbundled network element. Id.; 47 U.S.C. § 251(c)(3);

Iowa Utilities Bd., 120 F.3d at 308-10. Nondiscriminatory access to OSS means "the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers." FCC Order ¶ 316; see id. at ¶ 518. An incumbent must comply with this requirement "as expeditiously as possible, but, in any event, no later than January 1, 1997." 47 C. F. R. § 51.319(f)(2); see FCC Order ¶ 525.

Presently, MCI gains access to OSS through an interim method, which is based on Web technology. It would like to gain access at parity with U S West through a real-time electronic interface. Apparently, however, the arbitrator thought that the Act required parity access only after it was developed through national standards or when U S West could provide it. He explained: "It is clear that the current situation [Web-based access] is not parity and that national standards are the most effective long term solution. In the meantime, U S WEST should comply with the FCC order to the maximum extent possible." (First MCI Arbitration Decision, at 60.)

MCI contends that the WUTC should not have permitted inferior OSS access to continue until now because the FCC requires parity access by January 1, 1997. Although the agreement adopts MCI's proposal for a real-time electronic interface as the ideal solution, the interim measures remain in effect with no clear termination date. (See MCI Agreement, Att. 5, §§ 2.3.1, 5.2.1 (requiring U S West to provide OSS functions on real-time, electronic basis); Att. 5, §§ 2.3.2, , 5.2.9 (requiring that MCI and U S West to develop interim solutions).)

Contrary to the WUTC's and U S West's assertions, the January 1, 1997 deadline was mandatory rather than a target date. The FCC determined that "providing nondiscriminatory access to operations support systems functions is technically feasible," FCC Order ¶ 520, so OSS must be provided now.

The MCI arbitrator purported to follow the AT&T arbitrator's decision. (First MCI Arbitration Order, at 60.) The AT&T decision criticized Web-based access as inferior and not in accordance with the FCC's pronouncement, but permitted it to be used for pre-ordering because the parties had agreed to develop this interim system together. In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc., WUTC, Arbitrator's Report and Decision, Docket No. UT-960309, at 25 (Nov. 27,1996).

No such agreement existed here. The provisions for interim access are contrary to binding FCC regulations and should be removed. The provisions for parity access should remain, but revised to include a clear deadline. The only district court to examine this issue came to the same result: "[T]he [state commission] has overstepped its bounds in the hopes of reaching a reasonable compromise. FCC regulations required action to be taken by a date certain, and did not envision an open-ended process of reassessment. Therefore, the issue is remanded to the [state commission] to set a date certain by which electronic access to OSS must be made available to MCI." MCI v. BellSouth, slip op. at 21.

The court remands to the WUTC with instructions to set an immediate and firm deadline for parity OSS access. U S West may not disrupt providing MCI the best possible OSS access in the interim.

C. Deaveraging Rates for Unbundled Network Elements

MCI argues that the WUTC violated the Act because it refused to "deaverage" the rates for unbundled network elements. Deaveraging entails dividing the state into several geographic regions, and then using the average rate for each region as a basis for the price of network elements. The rationale underlying deaveraging is that rural areas are more

costly to serve, than urban areas and the closer one gets to the "actual" rates the better. MCI proposed three zones. The WUTC chose to retain a statewide average rate.

The Act does not address deaveraging; it provides that unbundled network elements must be "based on cost." 47 U.S.C. § 252(d)(1)(A)(i). The FCC required deaveraging into at least three zones per state, FCC Order. at ¶ 765; 47 C.F.R. § 51.507(f), but this command was vacated by the Eighth Circuit. Iowa Utilities Bd., 120 F.3d at 800 & n.21. State commissions have the exclusive authority to set rates. Id. In a pre-Act proceeding, the WUTC rejected a similar proposal by U S West to deaverage rates. It explained:

> Many factors led the [WUTC] to reject zone pricing in favor of a single statewide rate. There is no demonstration that USWC's proposed zones correctly place exchanges in the proper zones. Indeed, USWC has included some very rural exchanges in its so-called "urban" zone. Even if USWC had proposed a cost-based division of exchanges, the two zones would have contained exchanges that had different customer densities and therefore different costs.
>
> The same logic that would support the zone concept would then call for dividing each zone into sub-zones, with the only logical stopping point being a unique rate for each customer, reflecting that customer's costs.

Fifteenth Supplemental Order, slip op. at 106. The MCI arbitrator here relied upon this order when choosing not to deaverage for the interim prices; he said that it would be appropriate to consider this issue in the generic proceedings. (First MCI Arbitration Order, at 30.)

The legal question is whether the WUTC based the price of unbundled network elements on cost. It did: average

statewide costs. The more precisely one draws subdivisions, the closer one approaches the cost of providing service to an individual customer. Whether Washington is divided into three zones or left as one, average cost is always a proxy for "actual" cost. Pecuniary interest and public policy determines how to cut the pie. The WUTC did not err legally or act arbitrarily or capriciously in choosing one average rate.

D. Performance Standards and Noncompliance Compensation Credits

MCI says that the WUTC should have accepted its proposals for (1) detailed performance standards that U S West would have to meet, and (2) compensation credits that U S West would give MCI for noncompliance with these standards. MCI argues that because the WUTC didn't agree, no effective enforcement of the agreement exists, thereby violating the Act's requirement that access and services be provided on terms that are just, reasonable, and nondiscriminatory. These assertions lack merit.

An ILEC must provide a CLEC with access and services "at least equal in quality" to that provided to itself. 47 U.S.C. § 251(c)(2)(C); see 47 U.S.C. § 251(c)(3). Although the arbitrator found MCI's proposal consistent with the Act, he adopted the WUTC's general performance standards instead. (First MCI Arbitration Order, at 69.) The MCI agreement presently provides:

> The standard of performance for each of the measurements of performance in Washington shall be the quality of service which U S West provides in Washington to either itself, its ten (10) largest end user Customers in the aggregate, independent LECs in the aggregate, other CLECs in the aggregate, or other quality of service requirements imposed by the [WUTC], whichever is highest.

(MCI Agreement, Part A ¶ 52.1.1.) U S West must meet performance criteria for specified activities and during specified review periods. (Id., at ¶¶ 52.1.1-52.1.3.) If U S West fails to meet the performance criteria for two consecutive periods, MCI and U S West will negotiate or enter non-binding arbitration, and MCI may seek regulatory or legal relief, including requesting specific performance, (Id. at ¶ 52.2.) In approving this agreement, the WUTC held that if MCI needed more information or sought higher standards, it should use the agreement's BFR process. (MCI Approval Order, at 10.)

Although these provisions were not preferred by MCI, they do not violate the Act. MCI has not supported its accusation that these provisions are so unenforceable as to undermine the purpose of the Act; at most, its proposals would simply be "better." Moreover, the WUTC did not act arbitrarily or capriciously.

E. Nonrecurring Charges

The Act requires only that the rate "be based on the cost . . . of providing the interconnection or network element." 47 U.S.C. § 252(d)(1)(A)(i). Nonrecurring charges are the one-time costs that U S West incurs when a service is established, disconnected, or changed. MCI contends that such charges violate the Act because they are not based on efficient, forward-looking economic costs. It also contends that such charges were already accounted for in MCI's TELRIC pricing model, the Hatfield model, which the arbitrator accepted.

In this modified final-offer arbitration, the arbitrator selected U S West's nonrecurring charges because MCI did not propose such charges. (First MCI Arbitration Order, at 27.) He explained:

> MCImetro asserts that the Hatfield model recovers all costs but, unless the Commission decides in the generic case to recover all

> nonrecurring costs through recurring charges, the short duration of interim rates will prevent U S WEST from recovering nonrecurring costs. U S WEST's costs [sic] studies probably overstate nonrecurring costs to a similar extent as other costs, so the Arbitrator declines to require the parties to rerun the Hatfield model with the Arbitrator's choice of assumptions. The lower-than-perfect Hatfield numbers will tend to offset, albeit in a less-than-perfect way, the higher-than-perfect U S WEST nonrecurring cost numbers. A "perfect" match between TELRIC and prices is something the [WUTC) will be in a better position to pursue, to the extent anyone can perfectly estimate forward-looking costs over the long term, in the generic costing/pricing proceeding.

(Id.)

The arbitrator's decision is confusing because it is unclear whether he accepted U S West's nonrecurring charges because (1) the TELRIC model didn't include them; or (2) the TELRIC model did include them but the model would not adequately compensate U S West during the interim period before final prices. If the TELRIC model didn't include nonrecurring charges in calculating costs, then these charges are proper to compensate U S West. If the TELRIC model already included nonrecurring charges in the recurring rates, the additional charges provide U S West with improper double recovery.[11]

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[11] TELRIC stands for "Total Element Long Range Incremental Cost." A TELRIC model's advantage is, therefore, an ability to account for long-range costs. That such a model would inadequately compensate an ILEC for a short duration is self-evident, and not a disadvantage so long as such a model is also employed in the long term.

The court cannot understand the WUTC's rationale and so must remand on this issue. The WUTC is instructed to make a clear finding as to whether or not the accepted TELRIC model accounted for nonrecurring charges, rather than attempting to split the difference between a "too high" and a "too low" estimate of what may be separate charges. It is proper to levy nonrecurring charges so long as MCI's TELRIC model did not account for them.

V. WUTC'S CLAIMS

The WUTC moved for summary judgment on issues that U S West has decided not to pursue. (U S West Summary Judgment Motion, at 41 n.30.) These issues are moot.

VI. CONCLUSION

The summary judgment motions of MCI, U S West, and the WUTC are granted in part and denied in part in the ways set forth above. U S West's taking claim is dismissed without prejudice. MCI's claim regarding nonrecurring charges is remanded to the WUTC as specified above. As these rulings dispose of the case, judgment will be entered accordingly. No party will recover costs.

The clerk is directed to send copies of this order to all counsel of record.

DATED at Seattle, Washington this 21st day of July, 1998.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C97-1320R
(Consolidated)

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., et al.

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

U S West Communications, Inc. ("U S West") brought this action pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission ("WUTC") concerning interconnection between U S West and AT&T Communications of the Pacific Northwest, Inc. ("AT&T"). AT&T seeks to compete in the local telecommunications market. The defendants are AT&T and the WUTC and its commissioners. The FCC has filed a brief *amicus curiae*.

All parties have moved for summary judgment. U S West asserts that certain terms of the agreement are inconsistent with Sections 251 and 252 of the Act, with *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert.*

granted, AT&T v. Iowa Utilities Bd., 118 S. Ct. 879 (1998), and with FCC regulations. AT&T says that the agreement should have provided for "shared transport" as an unbundled network element. The court has fully considered all the papers filed. Because there is no genuine issue of material fact for trial, the case will be decided as a matter of law pursuant to Federal Rule of Civil Procedure 56.[1]

(a) BACKGROUND

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of Title 47, United States Code), was "designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local telephone service . . . to facilitate the entry of competing companies into local telephone service markets across the country." *Iowa Utilities Bd.*, 120 F. 3d at 791. Specifically, the Act forced an incumbent local exchange carrier ("ILEC") (1) to permit new entrants to interconnect with the ILEC's existing network (*interconnection*); (2) to provide entrants access to the ILEC's individual "network elements" on an unbundled basis (*unbundled access*); and (3) to sell to entrants at a wholesale rate any telecommunications service that the ILEC offers at retail to its own customers, so that the new entrant can resell it (*resale*). 47 U.S.C. §§ 251-52.

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[1] The court finds it unnecessary to hear oral argument due to the clarity of briefing, sufficiency of the record, and the similarity of most issues to cases decided by other courts.

This case contains many issues substantially similar or identical to two other cases involving U S West and the WUTC: *MCI Telecommunications Corp. v. U S West Communications, Inc.*, No. 97-1508R (consolidated); and *U S West v. Sprint Communications Co.*, No. 97-1764R. As a result, U S West and the WUTC each filed consolidated briefs for all three cases, and U S West's competitors collaborated on a single brief regarding standard and scope of review. The court has issued separate orders in the MCI and Sprint cases contemporaneously with this one.

The Act creates a multi-step process through which entrants to the local telephone market ("competing local exchange carriers" or "CLECs") gain use of the ILEC's network and services. First, both parties must negotiate. 47 U.S.C. §§ 251(c)(1), 252(a)(1). If negotiations stall, either party may petition the state utility commission for arbitration on the unresolved issues. Under the WUTC's procedure, when an impasse is reached, the arbitrator employs a modified "final offer" system: she will choose between the parties' last proposals; if they both conflict with the Act or WUTC policy, she will make a decision consistent with these requirements. Any final agreement, whether reached voluntarily or through arbitration, must be approved by the state commission. 47 U.S.C. § 252(e)(1).

AT&T and U S West seek review of their final agreement under 47 U.S.C. § 252(e)(6).[2]

(b) SCOPE AND STANDARD OF REVIEW

As to scope of review under 47 U.S.C. § 252(e)(6), the court confines consideration to the administrative record and will not hold a de novo proceeding. *See United States v. Bianchi & Co., Inc.*, 373 U.S. 709, 715 (1963); *see, e.g., GTE South Inc. v. Morrison*, No. 3:97CV493, slip op. at 6-7 (E.D. Va. May 19, 1998); *TCG Seattle*, slip op. at 3.

As to the standard of review, the parties agree that a state agency's legal interpretation of the Telecommunications Act is reviewed de novo. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997). This interpretation is not due deference as is a federal agency's under *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel Inc.*, 467

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[2] Review of this final agreement extends necessarily to the underlying orders made by the WUTC throughout the arbitration period that became part of the agreement. *See U S West Communications, Inc. v. TCG Seattle*, No. C97-354WD, slip op. at 3 (W.D. Wash. Jan. 22, 1998) [hereinafter *TCG Seattle*].

U.S. 837, 843 (1984), because a state agency lacks the impetus, expertise and capability to harmonize federal law that a federal agency has. *See Orthopaedic Hosp.*, 103, F. 3d at 1495-96.

The WUTC's factual findings, however, will be reviewed as to whether they are arbitrary or capricious. *See MCIMetro Access Transmission Services Inc. v. GTE Northwest, Inc.*, No. C97-742WD, slip op. at 4 (W.D. Wash. July 7, 1998) [hereinafter *GTE Northwest*]. The Act authorizes the state commissions to hear evidence and set rates and schedules, subject to district court review of whether they have complied with the Act and FCC pronouncements. *See* 47 U.S.C. § 252(b)-(e); *Iowa Utilities Bd.*, 120 F.3d at 806.

If the district court finds invalid an aspect of the agreement, it will strike that portion and remand to the state commission for renegotiation. *See AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, No. 5:97-CV-405-BR, slip op. at 15-16 (E.D. N.C. May 22, 1998) [hereinafter "*AT&T v. BellSouth*"].

(c) U S WEST'S CLAIMS

(1) Combining Unbundled Elements

Prices for unbundled access are "cost-based." 47 U.S.C. §§ 251(c)(3), 252(d)(1). Prices for resold services are "on the basis of retail rates charged to subscribers for the telecommunications service," minus the cost avoided by the ILEC of selling the service wholesale ("wholesale"). 47 U.S.C. § 252(d)(3). U S West argues that the AT&T agreement violated the Act by requiring it to combine unbundled network elements for sale at a "cost-based" price rather than at a "wholesale" price.[3] It is correct.

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[3] (*See* AT&T Agreement, Att. 3 ¶ 1.2.2 ("AT&T may purchase unbundled network Elements individually or in Combinations without

The Act provides: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). The Eighth Circuit interpreted this sentence to mean that "requesting carriers will combine the unbundled elements themselves." *Iowa Utilities Bd.*, 120 F.3d at 813. That is, while the Act requires ILECs to provide unbundled elements to CLECs, it could not be read "to levy a duty on the incumbent LECs to do the actual combining of elements." *Id.* The court clarified:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services.

Id.

AT&T contends that U S West waived any challenge to the combining provisions because it did not raise this particular legal argument before the WUTC. U S West's omission is immaterial. The arbitrator applied an FCC interpretation of the law that has since been repudiated. This court need not refrain from applying the current law.

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restrictions as to how those elements may be rebundled."); *id.*, Att. 5 ¶ 3.2.15.1 ("AT&T may order and U S West shall provision unbundled Network Elements either individually or in any combination on a single order. Network Elements ordered as combined shall be provisioned as combined.").)

AT&T and the WUTC also argue that the court either lacks subject matter jurisdiction or should refrain from deciding this issue because U S West failed to exhaust the agreement's dispute resolution mechanism. Exhaustion of remedies is inapt here. First, the Act provides that "any party aggrieved" by a state commission's determination may bring a federal court action to determine whether an agreement contradicts the Act. The agreement's negotiation clause does not purport to deprive the court of this power, or purport to be a mandatory first step.

AT&T maintains that the dispute resolution provision has not been triggered because of the Supreme Court's grant of certiorari of the Eighth Circuit decision. This court will follow the existing precedent set by *Iowa utilities* and will not adopt a wait and see approach.

Substantively, AT&T and the WUTC contend that *Iowa Utilities* constrained only the FCC's authority to require combining, leaving it open for state commissions to order combining of network elements based upon independent state grounds and their rate-setting authority. *Iowa Utilities* cannot be read so narrowly. According to *Iowa Utilities*, requiring ILECs, at cost-based rates, to combined or not to separate already combined network elements violates the Act. *See Iowa Utilities Bd.*, 120 F.3d at 813; *see also GTE Northwest*, slip op. at 7-8.

The court vacates the requirements that U S West combine/restrain from separating network elements at cost-based rates, and remands to the WUTC to negotiate replacement language.

(2) Performance Standards

Section 251(c)(2)(C) provides that ILECs must provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself . . . ." The Eighth Circuit explained that "this phrase mandates only that

the quality be equal -- not superior." *Iowa Utilities Bd.*, 120 F.3d at 812. U S West contends that the AT&T agreement requires it to meet technical standards on tight deadlines that exceed its standards for itself, thereby violating 47 U.S.C. § 251(c)(2)(C). This argument is unpersuasive.

First, U S West confuses requirements for the quality of interconnection with the timeliness for complying with such requirements. Section 251(c)(2)(C) addresses only the quality of interconnection, so any U S West complaints regarding timeliness and penalties for not meeting them have no merit.

Second, most of the provisions about which U S West complains were negotiated, not arbitrated.[4] Accordingly, the WUTC could reject such negotiated provisions only if they discriminated against a third-party telecommunications carrier or they were inconsistent with public policy. 47 U.S.C. § 252(e)(2)(A). The court finds that the WUTC properly accepted the agreement provisions.

Finally, U S West's other challenges to arbitrated provisions do not require superior quality interconnection.[5]

(3) Reciprocal Access to Poles, Ducts, Conduits, and Rights-of-way

Section 251(b)(4) provides that all local exchange carriers have "[t]he duty to afford access to the poles, ducts, conduits and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions *that are consistent with Section 224*." (emphasis added). U S West argues that because it is required to provide such access to AT&T, but AT&T is not required to

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[4] These include: AT&T Agreement, Part A ¶¶ 40.3.16-.18; AT&T Agreement, Att. 3, ¶¶ 3.1, 4.2.1.1, 4.4, 6.2.2, 7.2, 7.4.

[5] AT&T Agreement, Part A ¶¶ 51.3-51.4 require only that U S West make available to AT&T unused transmission media and dark fiber.

provide similar access to it, the agreement violates the Act. This is incorrect if one examines the cross-references Section 224.

Section 224(f)(1) provides that "[a] utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Section 224(a)(5), however, provides that "[f]or the purposes of this section, *the term 'telecommunications carrier' . . . does not include any incumbent local exchange carrier* as defined in Section 251(h)." U S West is an incumbent local exchange carrier as defined in Section 251(h); therefore, AT&T is not obligated to provide reciprocal access to U S West.[6] The WUTC did not err.

(4) Expanding Facilities

U S West argues that certain provisions require it to provide superior quality access to AT&T in violation of Section 251(c)(2)(C) because it must expand its facilities to accommodate competitors.[7] It also contends that the agreement improperly requires it to exercise eminent domain authority for the benefit of AT&T.[8] Because all

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[6] The FCC, whose opinion was not relied upon here, agrees. *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC Docket No. 96-98, First Report and Order (August 8, 1996) ¶ 1231 [hereinafter *FCC Order*]. This paragraph was untouched by *Iowa Utilities*.

[7] The AT&T agreement provides: "U S WEST shall take all reasonable steps to expand its facilities to accommodate AT&T's request . . . . Before denying access based on lack of capacity, U S WEST must explore potential accommodations with AT&T." (AT&T Agreement, Part A ¶ 47.4.19.)

[8] U S West refers to language in the agreement that provides that it will exercise its eminent domain authority when necessary to expand an existing right-of-way over private property in order to accommodate a request for access to that right-of-way. (*See* AT&T Agreement, Part A ¶ 47.4.4.)

telecommunication providers can exercise eminent domain under Wash. Rev. Code 80.36.010, U S West argues that AT&T should be required to expand its own rights-of-way. These assertions lack merit.

First, such expansion does not create superior quality access; it creates equivalent access. Because U S West can expand its capacity to suit its needs, "[t]he principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers . . . ." *FCC Order* ¶ 1162. The Eighth Circuit endorsed the FCC's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." *Iowa Utilities*, 120 F.3d at 813 n.33 (quoting *FCC Order* ¶ 198 (discussing technical feasibility)). The FCC declined to craft a rule categorically prescribing when a utility must expand an existing facility as requested versus when it may choose to decline due to infeasibility. *FCC Order* ¶ 1163. Nevertheless, it interpreted the Act "to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access." *Id.* The WUTC relied upon the language of these valid FCC statements in approving these provisions.

Second, U S West bases its argument regarding its inability to exercise eminent domain on an imprecise interpretation of the law. Under state law, all telecommunications carriers indeed can exercise eminent domain. What's important is whether a competing carrier can have access to *U S West's* right-of-way, and consequently, U S West's existing network.

This court agrees with the WUTC's conclusions.

(5) Non-Reciprocal Reservation of Excess Capacity

U S West argues that it is forced to provide superior quality access because it must permit AT&T to reserve excess space on its poles, ducts, conduits, and is prevented from reserving such space for its own future use beyond emergency or maintenance spare. U S West is incorrect.

These agreement provisions exist to prevent U S West from discriminating in favor of itself:

> Permitting an incumbent LEC . . . to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.

FCC Order ¶ 1170. The focus is on current use by AT&T, rather than speculative future use by U S West. After a confirmed request for space is made, U S West must reserve it for ninety days, within which time AT&T chooses whether to use or decline it. (AT&T Agreement, Part A ¶¶ 47.4.10, 47.4.20, 51.5) Quality is not the issue, parity is: the space either will be used or remain unused, not remain reserved for U S West indefinitely, unless safety dictates such a use.

The WUTC relied upon valid FCC proscriptions in approving these provisions.

(6) Collocation of Remote Switching Equipment

U S West argues that the requirement that it collocate AT&T's remote switching units (RSUs) is U S West's facilities violates the Act.[9] It is incorrect.

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[9] It refers to AT&T Agreement, Part A ¶¶ 40.1.5-.6. Collocation "enables a requesting telecommunications carrier to . . . [p]lace its own

Section 251(c)(6) provides that U S West has "[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ." The FCC defines "necessary" as "used" or "useful," not "indispensable." *FCC Order* ¶ 579. Thus, transmission equipment may be collocated and state commissions may designate additional types of equipment to be collocated. *FCC Order* ¶ 580. The FCC held:

> At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute that *state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements*.

FCC Order ¶ 581 (emphasis added).

The WUTC here determined that RSUs are equipment necessary for interconnection or access to unbundled network elements and that without RSUs CLECs would be at a technical and economic disadvantage in the transmission and routing of telephone service. (*See In re Petition for Arbitration of an Interconnection Agreement Between AT&T*

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equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises." 47 C.F.R. § 51.5.

Communications of the Pacific Northwest, Inc. and U S West Communications, Inc., WUTC, Commission Order Modifying Arbitrator's Decision and Arbitrator's Recommendations, and Approving Interconnection Agreement with Modifications, Docket No. UT-960309 (July 11, 1997), at 10 [hereinafter "AT&T Approval Order"].) The WUTC distinguished between RSUs and fully equipped switching equipment. (*See id.*) This determination was neither arbitrary nor capricious, was based on sufficient evidence, and was within the WUTC's discretion to decide.

(7) Unbundling of Dark Fiber

U S West challenges the requirements that it provide AT&T with "dark fiber" as an unbundled network element. Dark fiber is "fiber-optic cable that has been laid into a telecommunications provider's network but which is not 'lit' by electronics on either end of the cable, or at least not by electronics provided by the local carrier. No switches are routing digital impulses onto this fiber and it consequently carries no information." *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, No. 5:97-CV-425-BR, slip op. at 6 (E.D.N.C. May 22, 1998) [hereinafter "*MCI v. BellSouth*"]. A "network element" is "a facility or equipment used in the provision of a telecommunications service," which includes "features, functions, and capabilities" provided by such facilities. 47 U.S.C. § 153(29). The FCC declined to address whether dark fiber should be unbundled as a network element because it lacked a sufficient record to decide. *FCC Order* ¶ 450. States may impose additional unbundling requirements so long as such requirements are consistent with the Act and FCC regulations. *Id.* at ¶ 244.

This is a two-step inquiry: (1) is dark fiber a network element; (2) if so, should it be unbundled? U S West argues first that "dark fiber" is not a network element because it is not actively "used" in the provisions of telecommunications services. Alternatively, it argues that because dark fiber is

proprietary, AT&T must show a heightened need to use it. U S West's interprets "network element" too narrowly and has not shown that dark fiber should not be unbundled.

Dark fiber is a physical component that, if lit, undoubtedly would be a network element. The fiber is not on spools in a warehouse, it is already in the ground as part of a network, awaiting only an LEC's desire to attach the proper equipment. U S West's distinction is, therefore, purely temporal. It argues that "used" means only "currently used," not used in the sense of "employed for some purpose." Because the Act's does not specify a particular, technical definition of "used," such preciseness should not be implied.

In *MCI v. BellSouth*, slip op. at 6, the Eastern District of North Carolina found dark fiber to be a network element, vacating the state commission's order to the contrary. It relied on construing "network element" broadly, in the spirit of *Iowa Utilities*, and previous FCC language that dark fiber service was "wire communication." *Id.* at 6-9. Its reasoning is persuasive.

If a state commission determines that it is technically feasible for an ILEC to provide access to an unbundled network element, the commission may decline to require unbundling only if: (1) the network element is proprietary and the CLEC could provide the same service by using nonproprietary elements; or (2) failure to provide access "would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service" a CLEC seeks to offer. 47 C.F.R. § 51.317(b); *see* 47 U.S.C. § 251(c)(3), 251(d)(2). The burden is upon the ILEC to prove that an element is proprietary. *FCC Order* ¶ 283.

U S West argues for the first time that dark fiber is proprietary because revealing the existence of "dark fiber" shows its business plan for expansion. This argument is inapposite. Whether an element is proprietary is a factual,

not a legal, question. U S West provided no evidence before the WUTC that dark fiber was proprietary and therefore never satisfied its burden of proof.

AT&T, on the other hand, presented evidence that denying it access to dark fiber would decrease the quality and increase the cost of providing services. (*See* AT&T Record, at 5231-32 (Testimony of John P. Lynott) .)

The WUTC did not err legally nor act arbitrarily or capriciously.

(8) Pricing Claims

U S West contends that the WUTC approved prices, terms, and conditions that unjustly denied U S West adequate compensation.[10] The court reviews de novo whether the WUTC employed a methodology that, as a matter of law, violates the Act. The court reviews whether the WUTC's fact-finding, including choice of methodology, was arbitrary or capricious.

1. Unbundled Loop Prices

Simply stated, a local loop is the portion of the network that connects the customer with the network. The state commission determines whether the rates, terms, and conditions for such unbundled elements are just and reasonable. 47 U.S.C. §§ 251(c)(3), 252(d)(1). This determination is "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element," must be nondiscriminatory, and "may include a reasonable profit." 47 U.S.C. § 252(d)(1)(A).

---

[10] The prices set in the agreement and approved by the WUTC are interim prices: they are subject to change during the WUTC's generic price and cost proceeding.

The parties acknowledge that this means that price should be based on the forward-looking, i.e., incremental, costs of providing the element rather than on historic or embedded costs, and that the WUTC should, therefore, employ a TELRIC ("Total Element Long Run Incremental Cost") methodology. See *FCC Order* ¶ 678 (describing TELRIC). They disagree about which TELRIC model was better. The arbitrator accepted AT&T's "Hatfield model," which produced a price of $11.33, and rejected U S West's independent cost study, which produced a price of $36.20.

The choice of the Hatfield model was neither legal error nor arbitrary or capricious. In a pre-Act proceeding, the WUTC approved an earlier version of the Hatfield model. *See Washington Utilities and Transportation Comm'n v. U S West Communications, Inc.*, WUTC , Fifteenth Supplemental Order, Docket No. UT-950200, slip op. at 86 (April 11, 1996), *aff'd, U S West Communications, Inc. v. Washington Utilities and Transportation Comm'n*, 134 Wash. 2d 74 (1997). The FCC specified the Hatfield model as the kind of generic, forward-looking model that best comports with TELRIC principles. *FCC Order* ¶ 834.

The WUTC found U S West's proposed cost studied less reliable. While the Hatfield model used inputs consistent with inputs the commission had found to be reasonable, U S West's cost studies used unverifiable cost data, inputs that were inconsistent with the WUTC's rate order, and excessive allocation of costs that appeared to be an attempt to recover embedded costs. (*See In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc.*, WUTC, Arbitrator's Report and Decision, Docket No. UT-960309 (Nov. 27, 1996), at 43-44 [hereinafter "First AT&T Arbitration Order"].)

U S West argues nonetheless that the WUTC behaved arbitrarily and capriciously because it relied upon improper prices for inputs. In support, U S West points to the evidence

that it presented to the arbitrator. This is an attack on the choice of the Hatfield model, and an attempt to retry the facts.[11] While conflicting interpretations of the evidence exist, none of the arbitrator's choices are arbitrary or capricious.

2. Customer Transfer Charge

U S West challenges the $5.00 customer transfer charge selected by the AT&T arbitrator and approved by the WUTC. It had proposed $55.00. This charge is a nonrecurring fee paid to U S West to compensate it for transferring its customer to a competitor's service or for transferring a customer from one competitor to another. The FCC concluded that states should determine reasonable and discriminatory rates for such charges. *FCC Order* ¶ 970.

The arbitrator relied upon testimony by AT&T that U S West's estimates for nonrecurring charges were excessive and difficult to verify. (*See In Re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc.*, WUTC, Arbitrator's Supplemental Order, Docket No. UT-960309 (Jan. 16, 1997), at 3 (citing AT&T Record 5641). In light of this lack of reliable information, he found that AT&T's figure, which was the same rate for transferring long-distance customers to different companies, to be a reasonable proxy on an interim basis. *Id.* This was not arbitrary or capricious.

3. One Point of Interconnection Per LATA

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[11] Earlier, this court struck a U S West affidavit, the primary purpose of which was to criticize the Hatfield model. That the Hatfield model may be improving with time is no indication that the WUTC either chose it improperly or that the inputs should now be revised for this interim price proceeding.

U S West challenges the WUTC's determination that AT&T may establish a single point of interconnection ("POI") per Local Access Transport Area ("LATA"). U S West contends that the Act requires a CLEC to have a POI in each local calling area in which that CLEC offers local service and that the present plan compensates U S West inadequately. It is wrong.

Under the Act, a new entrant may interconnect with the ILEC's facilities "at any technically feasible point." 47 U.S.C. § 251(c)(2); *see FCC Order* ¶ 209. The ILEC is relieved of this duty to provide interconnection at a particular point only if it proves to the state commission that interconnection at that point is not technically feasible. 47 C.F.R § 51.305(e). U S West does not contest that such a connection is technically feasible. The WUTC properly declined to consider the cost of a single POI per LATA because "[a] determination of technical feasibility does not include consideration of economic, accounting, [or] billing . . . concerns." 47 C.F.R. § 51.5; *see U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, slip op. at 9 (W.D. Wash. Jan. 7, 1998) (reaching same conclusion for same reasons) [hereinafter "*MFS Intelenet*"].

4. "Bill and Keep" Compensation

U S West contends that the interim "bill and keep" arrangement adopted by the WUTC in the AT&T agreement violates the Act because it provides for inadequate cost recovery. It is wrong.

Compensation provisions must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of calls that originate on the other carrier's network facilities. 47 U.S.C. § 252(d)(2)(A)(i). An agreement may "afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual

recovery (such as bill-and-keep arrangements)." 47 U.S.C. § 252(d)(2)(B)(i). In an independent proceeding, the WUTC approved of bill and keep as a method of reciprocal compensation. *See WUTC v. U S West Communications, Inc.*, WUTC, Fourth Supplemental Order, Docket No. 941464, slip op. at 29-32 (Oct. 31, 1995) [hereinafter "*Fourth Supplemental Order*"]. Similarly, the FCC found that a state may impose a bill and keep arrangement when neither party can rebut the presumption that traffic between carriers is balanced. *FCC Order* ¶ 1111-13.

U S West never rebutted the presumption that traffic was balanced with anything other than conclusory statements. (*See* AT&T Record 6079-80, 6286-92, 6305-07; AT&T Transcript 657-58.) In consideration of this, and that U S West's proposed alternative was previously found to be inferior, *see Fourth Supplemental Order*, slip op. at 28, the WUTC did not act arbitrarily or capriciously by choosing bill and keep because it is consistent with the Act, WUTC policy, and FCC statements. *See TCG Seattle*, slip op. at 7 (approving bill and keep because permitted by Act, approved in independent WUTC proceeding, and approved by FCC).

5. Construction and Conditioning Charges on Local Loops

U S West challenges two aspects of the AT&T agreement. It argues that: (1) U S West must "make changes to its network facilities, services and operations to provide interconnection and unbundled elements" upon request, which means providing "superior services"; and (2) the WUTC failed to require AT&T to pay conditioning charges for the local loop. Both contentions lack merit.

First, U S West improperly proposes that this is a "superior access" issue; this is a question of equivalent access for resale services. U S West is providing AT&T no more than it provides itself: local loop for an end user. AT&T must pay for construction the same charges that apply to a

similarly situated U S West retail end user pursuant to U S West's retail tariffs. (*See* AT&T Agreement, Att. 1, at ¶ 3.1.) Modification of an ILEC's facilities to accommodate interconnection or access to network facilities, as it is required here, is contemplated by the Act. *See Iowa Utilities Bd.*, 120 F.3d at 813 n. 33.

Second, the WUTC did not act arbitrarily or capriciously when it rejected conditioning costs for local loops. In both cases, U S West provided no evidence that the cost of conditioning wasn't already included in the TELRIC price of a conditioned loop. (*See*, First AT&T Arbitration Decision, at 47.) As in *U S West Communications v. TCG Seattle*, "U S West presented no evidence of the actual costs of making changes to its network . . . . The arbitrator noted that U S West did not state in its proposal what is involved in conditioning, why a charge is needed, or how much the charge should be." *TCG Seattle*, slip op. at 6.

(9) Compensation for Interim Number Portability

Number portability enables users who switch telephone companies to retain the same telephone number. *See* 47 U.S.C. § 153(30). Until a permanent number portability system is developed, an ILEC must provide number portability using interim methods. U S West uses "remote call forwarding," in which a call to a competitor's customer dialed to the customer's old U S West number will be switched and forwarded to the competitor's number.

The Act provides that the costs of establishing number portability "shall be borne by all telecommunications carriers on a competitively neutral basis *as determined by the* [*FCC*]." 47 U.S.C. § 251(e)(2) (emphasis added). U S West contends that the AT&T agreement fails to compensate it for the costs of providing interim number portability. It is incorrect because the agreement is consistent with the Act and with binding FCC orders.

U S West says that the WUTC erred by allocating the costs of number portability in the AT&T agreement based on the amount of active local numbers each carrier has rather than on the number of calls actually forwarded. The FCC explicitly authorized allocation of cost recovery based on the number of active lines. *Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8352, at ¶ 136 (1996). It specifically rejected the kind of plan proposed by U S West because it would impose the full cost of number portability on new entrants. *Id.* at ¶ 138; *see also TCG Seattle*, slip op. at 9 (rejecting same U S West contentions).

(10) Due Process

U S West contends that the WUTC violated its due process rights because its decisions were not based on evidence in the record. The record refutes this contention.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). This was provided here. If the WUTC made errors, the errors were legal and not of constitutional magnitude. All its determinations were based on adequate evidence and none of its decisions were arbitrary or capricious. *See TCG Seattle*, slip op. at 10 (denying U S West's due process claim).

(11) Taking

U S West argues that the WUTC's approval of the agreement amounts to an unconstitutional taking. As Judge Dwyer noted:

> A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court.

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985).

TCG Seattle, slip op. at 10. These requirements have not been met here. U S West's taking claim is dismissed without prejudice.

Because this claim is identical to the ones disposed of in *GTE Northwest*, *TCG Seattle*, and *MFS Intelenet*, U S West now argues that it is not seeking compensation for a taking; it is seeking declaratory and injunctive relief to *prevent* a taking, "to demonstrate that its property may not be invaded and that it may not be required to provide access to its property on a below-cost basis." (U S West Motion for Summary Judgment, at 81.) This is circular. The Fifth Amendment provides that property cannot be taken "without just compensation." U S West's claim is still not ripe because the WUTC has not set permanent prices and U S West has not sought compensation in state court. Moreover, the court has found none of the interim price determinations to be arbitrary or capricious.

(d) AT&T'S SHARED TRANSPORT CLAIM

AT&T contends that the Act requires that "shared transport" be offered as an unbundled network element. "Shared transport" is a function performed by interoffice transmission facilities in an ILEC's network. AT&T seeks to share (with other CLECs and U S West) the capacity to transport calls between U S West end offices directly, rather than having the calls routed through an extra "tandem" switch, or purchasing more costly "dedicated" transport.

As mentioned earlier, a "network element" includes features, functions, and capabilities of any facilities that are used to provide telephone service. 47 U.S.C. §§ 153(29). The FCC is authorized to determine that network elements must be unbundled. 47 U.S.C. § 251(d)(2); *see Iowa Utilities Bd.*, 120 F.3d at 802 n. 23. It determined that network

elements include shared transport. *FCC Order* ¶ 440-41. These FCC determinations were untouched by the Eighth Circuit. *See Iowa Utilities Bd.*, 120 F. 3d at 808-810, 818 n.38.

The FCC regulations define "shared transport" as "transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." 47 C.F.R. § 51.319(d)(1)(ii). This description was clarified by another FCC order: "[T]he obligation of incumbent LECs to provide requesting carriers with access to shared transport extends to all incumbent LEC interoffice transport facilities, and not just to interoffice facilities between an end office and a tandem." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 12 F.C.C.R. 12460 (Aug. 18, 1997), at ¶ 25.

The arbitrator did not permit AT&T access to shared transport because he thought the issue too complex and evidence-intensive to resolve during post-arbitration proceedings. (*See In re Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and U S West Communications, Inc.*, WUTC, Arbitrator's Report and Recommendations, Docket No. UT-960309 (June 6, 1997), at 24.) The WUTC declined to do so for the same reason, and noted that the Bona Fide Process for Further Unbundling (BFR) process should be used. (*See* AT&T Approval Order, at 12.)

The WUTC and U S West argue that AT&T should be procedurally barred from raising this issue outside of the BFR process because it sought shared transport too late. This argument is unpersuasive because the question is legal, not factual: is shared transport a network element subject to unbundling? The court concludes that it is.

The BFR process provides an *alternative* process in which a CLEC can gain additional, not-yet-specified elements. Here, shared transport was a specified network element, so no alternative process need be invoked.

U S West also argues that shared transport is a service rather than a network element. This is irrelevant because capabilities may be offered simultaneously as services *or* unbundled elements. *Iowa Utilities Bd.*, 120 F.3d at 809.

(e) WUTC'S CLAIMS

The WUTC moved for summary judgment on issues that U S West has decided not to pursue. (U S West Summary Judgment Motion, at 41 n.30.) These issues are moot.

(f) CONCLUSION

The summary judgment motions of AT&T, U S West, and the WUTC are granted in part and denied in part in the ways set forth above. U S West's taking claim is dismissed without prejudice. As these rulings dispose of the case, judgment will be entered accordingly. No party will recover costs.

The clerk is directed to send copies of this order to all counsel of record.

DATED at Seattle, Washington this 21st day of July, 1998.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C97-1764R

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

SPRINT COMMUNICATIONS CO., L.P., et al.,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

U S West Communications, Inc. ("U S West") brought this action pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission ("WUTC") concerning interconnection between U S West and Sprint Communications Co., L.P. ("Sprint"). Sprint seeks to compete in the local telecommunications market. The defendants are Sprint and the WUTC and its commissioners. The FCC has filed a brief *amicus curiae*.

All parties have moved for summary judgment. U S West asserts that certain terms of the agreement are inconsistent with Sections 251 and 252 of the Act, with *Iowa Utilities Bd. v. FCC*, 120 F. 3d 753 (8th Cir. 1997), *cert. granted, AT&T v. Iowa Utilities Bd.*, 118 S. Ct. 879 (1998),

and with FCC regulations. The court has fully considered all the papers filed. Because there is no genuine issue of material fact for trial, the case will be decided as a matter of law pursuant to Federal Rule of Civil Procedure 56.[1]

(g) BACKGROUND

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of Title 47, United States Code), was "designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local telephone service . . . to facilitate the entry of competing companies into local telephone service markets across the country." *Iowa Utilities Bd.*, 120 F.3d at 791. Specifically, the Act forces an incumbent local exchange carrier ("ILEC") (1) to permit new entrants to interconnect with the ILEC's existing network (*interconnection*); (2) to provide entrants access to the ILEC's individual "network elements" on an unbundled basis (*unbundled access*); and (3) to sell to entrants at a wholesale rate any telecommunications service that the ILEC offers at retail to its own customers, so that the new entrant can resell it (*resale*). 47 U.S.C. §§ 251-52.

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[1] The court finds it unnecessary to hear oral argument due to the clarity of briefing, sufficiency of the record, and the similarity of most issues to cases decided by other courts.

This case contains certain issues substantially similar or identical to two other cases involving U S West and the WUTC: *U S West Communications, Inc. v. AT&T Communications of the Northwest, Inc.*, No. 97-1320R (consolidated); and *MCI Telecommunications Corp. v. U S West Communications, Inc.*, No. 97-1508R (consolidated). As a result, U S West and the WUTC each filed consolidated briefs for all three cases, and U S West's competitors collaborated on a single brief regarding standard and scope of review. The court has issued separate orders in the MCI and Sprint cases contemporaneously with this one.

The Act creates a multi-step process through which entrants to the local telephone market ("competing local exchange carriers" or "CLECs") gain use of the ILEC's network and services. First, both parties must negotiate. 47 U.S.C. §§ 251(c)(1), 252(a)(1). If negotiations stall, either party may petition the state utility commission for arbitration on the unresolved issues. Under the WUTC's procedure, when an impasse is reached, the arbitrator employs a modified "final offer" system: she will choose between the parties' last proposals; if they both conflict with the Act or WUTC policy, she will make a decision consistent with these requirements. Any final agreement, whether reached voluntarily or through arbitration, must be approved by the state commission. 47 U.S.C. § 252(e)(1).

Sprint and U S West seek review of their final agreement under 47 U.S.C. § 252(e)(6).[2]

(h) SCOPE AND STANDARD OF REVIEW

As to scope of review under 47 U.S.C. § 252(e)(6), the court confines consideration to the administrative record and will not hold a de novo proceeding. *See United States v. Bianchi & Co., Inc.*, 373 U.S. 709, 715 (1963); *see, e.g., GTE South Inc. v. Morrison*, No. 3:97CV493, slip op. at 6-7 (E.D. Va. May 19, 1998); *TCG Seattle*, slip op. at 3 [hereinafter *TCG Seattle*].

As to the standard of review, the parties agree that a state agency's legal interpretation of the Telecommunications Act is reviewed de novo. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997). This interpretation is not due deference as is a federal agency's under *Chevron*

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[2] Review of this final agreement extends necessarily to the underlying orders made by the WUTC throughout the arbitration period that became part of the agreement. *See U S West Communications, Inc. v. TCG Seattle*, No. C97-354WD, slip op. at 3 (W.D. Wash. Jan. 22, 1998) [hereinafter "*TCG Seattle*"].

U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 843 (1984), because a state agency lacks the impetus, expertise and capability to harmonize federal law that a federal agency has. *See Orthopaedic Hosp.*, 103 F.3d at 1495-96.

The WUTC's factual findings, however, will be reviewed as to whether they are arbitrary or capricious. *See MCIMetro Access Transmission Services, Inc. v. GTE Northwest, Inc.*, No. C97-742WD, slip op. at 4 (W.D. Wash. July 7, 1998) [hereinafter GTE Northwest]. The Act authorizes the state commissions to hear evidence and set rates and schedules, subject to district court review of whether they have complied with the Act and FCC pronouncements. *See* 47 U.S.C. § 252(b)-(e); *Iowa Utilities Bd.*, 120 F.3d at 806.

If the district court finds invalid an aspect of the agreement, it will strike that portion and remand to the state commission for renegotiation. *See AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, No. 5:97-CV-405-BR, slip op. at 15-16 (E.D.N.C. May 22, 1998) [hereinafter "*AT&T v. BellSouth*"].

(i) U S WEST'S CLAIMS

(1) Combining Unbundled Elements

Prices for unbundled access are "cost-based." 47 U.S.C. §§ 251(c)(3), 252(d)(1). Prices for resold services are "on the basis of retail rates charged to subscribers for the telecommunications service," minus the cost avoided by the ILEC of selling the service wholesale ("wholesale"). 47 U.S.C. § 252(d)(3). U S West argues that the Spring agreement violated the Act by requiring it to combine unbundled network elements for sale at a "cost-based" price rather than at a "wholesale" price.[3] It is correct.

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[3] In an arbitrated provision, the Sprint agreement provides:

The Act provides: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). The Eighth Circuit interpreted this sentence to mean that "requesting carriers will combine the unbundled elements themselves." *Iowa Utilities Bd.*, 120 F.3d at 813. That is, while the Act requires ILECs to provide unbundled elements to CLECs, it could not be read "to levy a duty on the incumbent LECs to do the actual combining of elements." *Id.* The court clarified:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services.

Id.

Sprint and the WUTC argue that the court either lacks subject matter jurisdiction or should refrain from deciding this issue because U S West failed to exhaust the agreement's

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> U S WEST agrees to perform and Sprint agrees to pay for the TELRIC costs of the functions necessary to combine requested elements in any technically feasible manner either with other elements from U S WEST's network, or with elements possessed or arranged for by Spring. However, U S WEST need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.
>
> (Sprint Agreement ¶ 32.1.2.)

dispute resolution mechanism. Sprint also says that deciding this issue would undermine negotiations in which the parties are presently engaged.

Exhaustion of remedies is inapt here. First, the Act provides that "any party aggrieved" by a state commission's determination may bring a federal court action to determine whether an agreement contradicts the Act. The agreement's negotiation clause does not purport to deprive the court of this power, or purport to be a mandatory first step. *See AT&T v. BellSouth*, slip op. at 18 n. 3 ("[T]his court is not bound by any renegotiation agreement between the parties and is not constrained to adopt the parties' 'wait and see' approach.").

Second, the court does not undermine negotiations by applying the law; it clarifies the law's scope. In the absence of a clear legal pronouncement, the parties lack sufficient guidelines for productive negotiations to proceed.

Requiring ILECs, at cost-based rates, to combine or not to separate already combined network elements violates the Act. *See Iowa Utilities Bd.*, 120 F. 3d at 813; *see also GTE Northwest*, slip op. at 7-8. The court vacates such requirements and remands to the WUTC to negotiate replacement language.

(2) Compensation for Interim Number Portability

Number portability enables users who switch telephone companies to retain the same telephone number. *See* 47 U.S.C. § 153(30). Until a permanent number portability system is developed, an ILEC must provide number portability using interim methods. U S West uses "remote call forwarding," in which a call to a competitor's customer dialed to the customer's old U S West number will be switched and forwarded to the competitor's number.

The Act provides that the costs of establishing number portability "shall be borne by all telecommunications carriers

on a competitively neutral basis *as determined by the* [*FCC*]." 47 U.S.C. § 251(e)(2) (emphasis added). U S West contends that the Sprint agreement fails to compensate it for the costs of providing interim number portability. It is incorrect because the agreements are consistent with the Act and with binding FCC orders.

"Access charges" are fees paid by long distance carriers to compensate LECs for transporting long-distance calls over the LEC's network in order to complete the calls. U S West says that the Spring agreement unfairly allocates access charge revenues.[4]

The FCC approved the kind of "meet point" billing arrangement found in the Sprint agreement. *FCC Number Portability Order* ¶ 140. To the extent that U S West challenges the exact division of revenues, the arbitrator did not act arbitrarily or capriciously, especially because U S West already receives compensation for remote call

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[4] The Spring agreement provides:

> Terminating access charges will be billed by each Party according to the Parties' respective tariffs to IXCs [long distance carriers] by the receiving local exchange carriers according to the resulting final ruling in [*Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 F.C.C.R. 8352, at ¶ 140 (1996) [hereinafter "*FCC Number Portability Order*"]] as follows:
>
> > The companies will establish a meet point relationship.
> >
> > Sprint will receive the end office charges (local switching), CCL and termination charges.
> >
> > Transportation will be shared by the companies and charged on a meet point basis to the ultimate end user switch on a percent of route miles provided.
> >
> > Tandem switching will be recovered by U S WEST along with entrance facility charges.
>
> (Spring Agreement ¶ 9.1.10).

forwarding through a separate charge, which was agreed upon through negotiation. (*See In re Petition for Arbitration of an Interconnection Agreement Between Sprint Communications Co., L.P. and U S West Communications, Inc.*, WUTC, Arbitrator's Report and Decision, Docket No. UT-960347 (Jan. 15, 1997), at 4); *see also U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, slip op. at 8 (W.D. Wash. Jan. 7, 1998) (approving of shared division of access charges and rejecting same U S West contentions) [hereinafter "*MFS Intelenet*"].

(3) Taking

U S West argues that the WUTC's approval of the agreement amounts to an unconstitutional taking. As Judge Dwyer noted:

> A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court. *Williamson Planning Comm'n v Hamilton Bank*, 473 U.S. 172, 186-97 (1985).

TCG Seattle, slip op. at 10. These requirements have not been met here. U S West's taking claim is dismissed without prejudice.

Because this claim seems identical to the ones disposed of in *GTE Northwest*, *TCG Seattle*, and *MFS Intelenet*, U S West now argues that it is not seeking compensation for a taking; it is seeking declaratory and injunctive relief to *prevent* a taking, "to demonstrate that its property may not be invaded and that it may not be required to provide access to its property on a below-cost basis." (U S West Motion for Summary Judgment, at 81.) This is circular. The Fifth Amendment says that property cannot be taken "without just compensation." U S West's claim is still not ripe because the

WUTC has not set permanent prices and U S West has not sought compensation in state court. Moreover, the court has found none of the interim price determinations to be arbitrary or capricious.

(j) CONCLUSION

The summary judgment motions of Sprint, U S West, and the WUTC are granted in part and denied in part in the ways set forth above. U S West's taking claim is dismissed without prejudice. As these rulings dispose of the case, judgment will be entered accordingly. No party will recover costs.

The clerk is directed to send copies of this order to all counsel of record.

DATED at Seattle, Washington this 21st day of July, 1998.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX G

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960310

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between

MCImetro Access Services, Inc. ("MCIm")
and
U S WEST Communications, Inc. ("USWC")

Pursuant to 47 U.S. C. Section 252.

COMMISSION ORDER APPROVING INTERCONNECTION AGREEMENT

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[TABLE NOT REPRODUCED]

II. ARBITRATION ISSUES

A. Issue 9: Collocation of Remote Switching Units (MCIm)

MCI's Request. MCIm asks the Commission to reverse the Arbitrator and allow collocation of Remote Switching Units (RSUs).

Report & Decision (at 38-39). The Arbitrator concluded that collocation of RSUs was not "necessary" under 47 U.S.C.251(c)(6). The analysis focused the need for RSUs in light of alternatives which do not include switching functions. Under that decision-making approach, the Arbitrator concluded that adequate alternatives existed.

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MCI's Argument. In Docket No. UT-960309, the commission followed a Staff recommendation and allowed AT&T to collocate RSUs. Staff's analysis is persuasive and consistent with MCI's position, and the evidence, in this docket. This is a matter which the FCC left to the states. It is the most efficient and economical way to achieve line concentration.

USWC's Argument. RSUs are primarily switches and USWC need not collocate them.

Decision-Making Standard. The FCC rules contemplate a two step analysis:

Necessity. 47 C.F.R. 51.5 defines "necessary" in terms of usefulness rather than necessity. There is no need for the CLEC to show an absence of alternatives.

Functionality. 47 C.F.R. 51.323(c) requires a finding that the equipment is not a switch.

Discussion. Collocation of remote switching units ("RSUs") is "useful" for interconnection under 47 C.F.R. 51.5 because RSUs provide line and trunk connections. A RSU is not a "switch" under 47 C.F.R. 51.323(c) because it requires a host to perform essential functions, including:

- Programming to define lines and trunks;
- Routing;
- Creation and use of engineering and billing data;
- Access to OSS systems (*e.g.* maintenance monitoring, engineering data, and recent changes); and
- SS7 signaling.

Even when a RSU has "stand-alone" capabilities, it needs its "umbilical cord" to the host for full switching functionality. In the stand-alone mode, it can only:

- Perform functions which the host has downloaded to the RSU for processing in the RSU;
- Route calls "internally" between lines attached to the RSU;
- Store some rudimentary engineering and billing data for subsequent uploading to the host; and
- Use rudimentary internal non-SS7 signaling.

While a RSU is not a switch, it can perform some functions which could enable a CLEC to avoid access charges. A CLEC may not use physically collocated RSUs to avoid payment of access charges.

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Conclusion. The Commission adopts MCI's contract language relating to collocation of RSUs.

B. Issue 40: Wholesale Discount (MCIm)

MCI's Request. MCIm asks the Commission to reject the Arbitrator's 13.96% discount in favor of MCI's 22.56% figure.

Report & Decision (at 16). The Arbitrator found problems with USWC's cost model, and MCI's data, which prevented him from fully adopting either party's proposal. He adopted the MCIm cost model and made some of the adjustments which USWC proposed.

MCI's Argument. The Arbitrator adopted an "issue-by-issue best and final offer" approach to the arbitration to encourage parties to adopt reasonable positions. He should have adopted MCI's 22.56% wholesale discount because he selected the Hatfield model and MCI's discount figure was not an extreme offer. By making adjustments, he allowed USWC to circumvent the process by inviting adjustment to 13.96% while retaining the possibility that the Arbitrator would adopt its "best" offer.

Even if it was appropriate to make selective adjustments, USWC did not propose adjustments when MCIm made conservative assumptions in USWC's favor and did not propose other adjustments to ensure internal consistency in the Hatfield model. The process of finding the "right" number for each cost study component requires a proceeding like the generic cost proceeding rather than the truncated process for arbitrations under the Act.

Discussion. The baseball arbitration model which the Commission adopted for these cases does not prevent the Arbitrator from crafting a solution when neither party's offer is acceptable. While some of MCI's assumptions may have conservatively favored USWC, it would not have been appropriate to adopt MCI's offer knowing that it was over 1-1/2 times the figure which appeared to be correct.

Conclusion. The Commission adopts the Arbitrator's Report & Decision on this issue.

APPENDIX H

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960309

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. and U S WEST COMMUNICATIONS. INC.

Pursuant to 47 U.S.C. Section 252.

COMMISSION ORDER MODIFYING ARBITRATOR'S DECISION AND ARBITRATOR'S RECOMMENDATIONS, AND APPROVING INTERCONNECTION AGREEMENT WITH MODIFICATIONS

MEMORANDUM

I. Procedural History

On March 1, 1996, AT&T Communications of the Pacific Northwest, Inc. ("AT&T") requested negotiations with U S WEST Communications, Inc. ("USWC") for an agreement relating to interconnection under terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, codified at 47 U.S.C. Sec, 151 ff. (1996). In this decision we will refer to the law simply as "the Act" or as "the Telecom Act."

On July 25, 1996, AT&T filed with the Commission and served on USWC a petition for arbitration pursuant to 47 U.S.C. Sec. 252(b)(1). The petition was designated Docket No. UT-960309. On August 5, 1996, the Commission entered an Order on Arbitration Procedure appointing an arbitrator for the proceeding and establishing procedures. A hearing was held before Mr. Simon J. Ffitch, Arbitrator, on October 21 and 22, 1996, at Olympia, Washington. AT&T was represented by Dan Waggoner, Patricia Raskin, and Susan Proctor, attorneys at law. USWC was represented by Edward T. Shaw, Lisa Anderi, and Doug Owens. attorneys at law. Following the hearing, the parties filed final briefs and final or 'last best" offers on November 5, 1996.

On November 27, 1996, an Arbitrator's Report and Decision ("Decision") was issued in this docket. On December 6, 1996, AT&T filed a Petition for Partial Reconsideration of Arbitrator's Report and Decision. The arbitrator agreed to review the Decision to correct errors of fact or law, or ministerial errors. Two issues were identified as appropriate for reconsideration: (1) pay phone resale; and (2) customer transfer charges. The Arbitrator's Supplemental Order addressing these issues was filed on January 16, 1997. The deadline for the parties to submit an agreement incorporating the determinations in the Decision and the Supplemental Order was reset for January 27, 1997.

* * * *

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4. The denial of physical collocation of remote switching units ("RSUs") would put a competing local exchange carrier ("CLEC") at a competitive disadvantage from both a cost and technical performance standpoint. Therefore, RSUs are equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. Fully equipped switching equipment (host class 5 switches) are not

equipment necessary for interconnection and should not be required to be physically collocated on the premises of a local exchange carrier. A CLEC should not use physically collocated RSUs to avoid payment of access charges.

5. There are no express limitations regarding the provision of shared transport in the Agreement. Furthermore, the Agreement expressly provides that any request for interconnection or access to an unbundled network element not already available via a price list tariff shall be treated as a request subject to the BFR process. The Agreement states that "network element" means a facility or equipment used in the provision of a telecommunications service. End office to end office interconnection is described as a facility or equipment used in the provision of a telecommunications service; therefore, it is a network element which is not available as a stand-alone item via price list or tariff. The BFR process would be triggered by AT&T's request under the terms and conditions of the Agreement.

6. The Commission has already required that each company provide a directory to its customers, that each directory include the listings of all customers without regard to which company serves them, and that each directory include contact information on all companies providing local exchange service in that area. Insofar as AT&T can distribute a directory to its customers with its name solely on the cover without being unduly discriminatory, it is not appropriate to require USWC to place AT&T's name or logo on its directory cover; each company should determine what information appears on the cover of the directories which they distribute to their respective customers.

7. There are a number of implementation schedule points contained in AT&T's proposed attachment 7 to the Agreement which are not found elsewhere in the body of the Agreement. The schedule proposed by AT&T is reasonable with the exception of service intervals which were included in attachment

8. The several clarifications which have been recommended by Commission Staff are well founded and necessary in order to accurately reflect the decisions by the arbitrators, and to provide the parties with a complete Agreement.

9. The Agreement is otherwise consistent with Washington law and with the orders and policies of this Commission.

* * * *

APPENDIX I

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960347

In the Matter of the Petition for Arbitration
of an Interconnection Agreement Between

SPRINT COMMUNICATIONS COMPANY L.P.
and U S WEST COMMUNICATIONS, INC.

Pursuant to 47 USC § Section 252.

COMMISSION ORDER APPROVING
INTERCONNECTION AGREEMENT WITH
MODIFICATION

MEMORANDUM

I. Procedural History

On April 15, 1996, Sprint Communications Company L.P. ("Sprint") requested negotiations with U S WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, codified at 47 USC § 151 et seq. (the "1996 Act" or "the Act").

On September 20, 1996, Sprint timely filed with the Commission and served on USWC a request for arbitration pursuant to 47 USC § 252(b)(1). The matter was designated

Docket No. UT-960347. On October 10, 1996, the Commission entered an Order on Arbitration Procedure appointing Simon Fitch as arbitrator and establishing certain procedural requirements. USWC timely responded to Sprint's petition on October 15, 1996.

"Final offer" arbitration was adopted for this arbitration. A hearing was held before the arbitrator on December 12, 1996, in the Commission's main hearing room in Olympia, Washington. Sprint was represented by Richard L. Goldberg, attorney, and USWC was represented by Lisa Anderi, attorney. Following the hearing, the parties filed final briefs and "last best offers" on January 3, 1997.

On January 15, 1997, the Arbitrator's Report and Decision ("Decision") was issued resolving the disputed issues presented in the final briefs and offers. In preparing the arbitration report in this matter, the arbitrator selected between the parties' last proposals as to each unresolved issue, selecting the proposal which was most consistent with the requirements of state and federal law and Commission policy. The arbitrator either chose either an entire proposal, or chose between parties' proposals on an issue-by-issue basis. In the event that neither proposal was consistent with law or Commission policy, the arbitrator rendered a determination in keeping with those requirements. The parties were instructed to submit an Interconnection Agreement ("Agreement") in accordance with the Decision within thirty days. The parties continued to negotiate and upon requests of the parties, for good cause stated, the Commission extended the filing deadline of the Agreement to May 19, 1997.

On May 19, 1997, each party filed a separate Request for Approval and Modification of the Agreement along with a signed copy of the Agreement. On June 13, 1997, the Commission convened an open meeting at its offices in Olympia, Washington, to consider the requests for approval of the Agreement. The Commission reviewed the record of

the proceeding: the Arbitrator's Decisions; the Agreement; written comments by the parties; the written Commission Staff report; and all oral comments *made at the open meeting* by Richard L. Goldberg for Sprint, Lisa Anderi for USWC, Jeffrey Goltz of the Attorney General's Office, and by Jing Roth and Glenn Blackmon of Commission Staff. Commission Staff presented its recommendation that the Agreement be approved without any modification of the Arbitrator's Decision or revisions to proposed language by the parties.

At the conclusion of the open meeting, the Commission adopted the Arbitrator's Decision and approved the Agreement subject to the modification and language changes which are discussed below. The Commission directed that a written order be prepared in accordance with its decision.

II. Modification of the Arbitrator's Decision

Sprint requested that language in the Agreement which related to the Arbitrator's Decision on the issue of Centrex resale restrictions be modified in order to further clarify the Decision. Staff stated its position that the Arbitrator's Decision on this issue was clear and that no clarification was necessary. USWC opposed the modification as being inconsistent with the Arbitrator's Decision. Sprint modified its request for clarification and proposed that the following language be included in the Agreement in Section 31.2.5.1:

> Centrex type services may only be sold to customers qualified to purchase those services pursuant to the USWC tariff.

The Commission determined that to the extent that the USWC Centrex tariff may be subject to contrasting interpretations when considered in the abstract, the availability of Centrex services for resale should be determined by the actual qualification of customers by USWC.

Commission Staff also recommended that all other requests for modification of the Arbitrator's Decision by the parties be denied. Sprint requested that the Commission interpret the MFN provisions as set forth in 47 USC § 252(i) to encompass a "pick and choose" approach. Sprint also requested that the Commission modify the Arbitrator's Decision by replacing the requirement that additional service measurements should be negotiated in a bona fide request ("BFR") process. USWC requested that the Arbitrator's Decision be modified to forward the carrier common line charge to Sprint for remote call forwarding when a Sprint customer retains a previous local phone number. USWC also requested that the Arbitrator's Decision be modified to prevent a requesting carrier to combine unbundled network elements for the purpose of providing a telecommunications service.

III. Generic Pricing Proceeding

On October 23, 1996, the Commission entered an order in this and other arbitration dockets declaring that a generic proceeding, UT-960369, et al., would be initiated in order to review costing and pricing issues for interconnection, unbundled network elements, transport and termination and resale.[1] The Commission stated that rates adopted in the pending arbitrations would be interim rates, pending the completion of the generic proceeding. Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which offers a more reasonable interim rate, more closely based on what we believe to be accurately determined cost levels based on evidence specifically submitted in this docket, our recent prior actions regarding cost studies, and our expertise as regulators. The findings and conclusions with respect to price proposals and

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[1] Order on Sprint's Petition to Intervene and to Establish Generic Pricing Proceeding (October 23, 1996; "Generic Pricing Order").

supporting information are made in this context and do not indicate Commission approval or rejection of cost and price proposals for purposes of the generic case.

IV. Application of Rates and Charges

The negotiated agreement between the parties regarding the application of rates and charges for interconnection, resold services, and unbundled network elements is that where no state-specified permanent or interim rates exist, they agree to use the ordered and approved American Telephone & Telegraph ("AT&T") rates as interim rates until such time as the Commission Issues an order in a generic proceeding, implementing approved rates, whether those approved rates are interim or final. The parties agree that the term "rates" includes rate structure, and that upon issuance of an order in the generic case. USWC will move Sprint to such approved rates and true up the amounts charged up to that point in time.

In Washington, the AT&T interim rates shall be established in Docket No. 960309 which is presently pending before the Commission. Sprint and USWC agree to file those rates(which are incorporated into the Agreement by reference) in this proceeding within ten days of the Commission's order approving the arbitrated interconnection agreement in Docket No. 960309.

V. The Eighth Circuit Order and the FCC Rules

The FCC's rules[2] implementing local competition provisions of the Telecom Act have been repealed and the rules relating to costing and pricing have been stayed by the

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[2] In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (August 8, 1996), Appendix B - Final Rules.

United States Court of Appeals for the Eighth Circuit.[3] The Arbitrator's Report and Decision and the Commission in this order comply with those provisions of the FCC order and rules that are not subject to stay. Those provisions which are subject to stay do not require compliance pending resolution of the federal appeal. However, the stay does not preclude reference by the Commission to the rationale or analysis underlying those provisions, for whatever value such information may have on its own merits.

Having considered the Arbitrator's Report and Decision, the Agreement, the requests for approval and modification filed by the parties to this arbitration, the entire record herein, and all written and oral comments made to the Commission, the Commission makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of telecommunications companies in the state.

2. The Washington Utilities and Transportation Commission is designated by the Telecommunications Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to Sections 251 and 252 of the Act.

3. USWC was, until recently, the de facto monopoly provider of switched local exchange service in its

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[3] *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996). The order also stays the "MFN" rule in which the FCC interpreted the statutory provisions regarding availability of contracted terms to other parties.

Washington exchanges, is an incumbent local exchange carrier, and is currently the dominant provider of switched local services within the territory of its Washington exchanges.

4. Sprint provides switched intraLATA and interLATA exchange service in Washington and seeks to provide competitive local exchange service in the intrastate territory of USWC.

5. On September 20, 1996, Sprint filed a Petition for Arbitration of an interconnection agreement with USWC pursuant to the Act. USWC responded to Sprint's petition on October 15, 1996. A hearing on the disputed issues was conducted by arbitrator Simon FFitch on December 12, 1996.

6. This arbitration and approval process was conducted pursuant to and in compliance with the Commission's Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996, Docket No. UT-960269, June 27, 1996. The Arbitrator's adoption of "best offer" arbitration was reasonable and was consistent with the authority delegated to the arbitrator in the Commission's Order on Arbitration Procedure dated October 10, 1996.

7. On January 15, 1997, the arbitrator issued an Arbitrator's Report and Decision resolving the disputed issues between the parties to this proceeding. The parties were instructed to submit an interconnection agreement in accordance with the Decision within thirty days. Upon the request of the parties, for good cause, extensions of time were granted by the Commission to May 19, 1997.

8. On May 19, 1997, Sprint filed its Request for Approval and Modification of Negotiated/Arbitrated Agreement and an unsigned Agreement for the State of Washington. On that same date, USWC filed its Request For

Approval and Modification of Arbitrated Agreement and the same proposed Agreement. Both parties requested modification of the Arbitrator's Decision and stated their respective positions regarding disputed language in the Agreement.

9. On June 13, 1997, the Commission held an open meeting at its Main Hearing Room in Olympia, Washington to consider the requests for approval of the Agreement. Commission Staff presented its recommendations regarding modification and adoption of the Arbitrator's Decision, and approval of the Agreement. Counsel for Sprint made comments relating to modification of the Arbitrator's Decision on the issue of Centrex resale restrictions. USWC opposed the modification as being inconsistent with the Arbitrator's Decision. Sprint modified its request and proposed that the following language be included in Section 31.2.5.1 of the Agreement:

> Centrex type services may only be sold to customers qualified to purchase those services pursuant to the USWC tariff.

10. Sprint requested that the Commission interpret the MFN provisions as set forth in 47 USC § 252(i) to encompass a "pick and choose" approach. Sprint also requested that the Commission modify the Arbitrator's Decision by replacing the requirement that additional service measurements should be negotiated in a bona fide request ("BFR") process. USWC requested that the Arbitrator's Decision be modified to forward the carrier common line charge to Sprint for remote call forwarding when a Sprint customer retains a previous local phone number. USWC also requested that the Arbitrator's Decision be modified to prevent a requesting carrier to combine unbundled network elements for the purpose of providing a telecommunications service. Commission Staff recommended that all requests for

modification of the Arbitrator's Decision by the parties be denied.

11. The negotiated agreement between the parties regarding the application of rates and charges for interconnection, resold services, and unbundled network elements is that where no state-specified permanent or interim rates exist, they agree to use the ordered and approved American Telephone & Telegraph ("AT&T") rates as interim rates until such time as the Commission issues an order in a generic proceeding, implementing approved rates, whether those approved rates are interim or final. The parties agree that "rates" include rate structure, and that upon issuance of an order in the generic case, USWC will move Sprint to such approved rates and true up the amounts charged to that point. In Washington, the AT&T interim rates shall be established in Docket No. 960309 which is presently pending before the Commission. Sprint and USWC agree to file those rates (which are incorporated into the Agreement by reference) in this proceeding within ten days of the Commission's order approving the arbitrated interconnection agreement in Docket No. 960309.

12. The Commission has reviewed and analyzed the Commission Staff's recommendations, the Arbitrator's Report and Decision, the proposed Agreement, the filings of the parties and the record herein, including the oral comments made at the open meeting. The Commission hereby adopts and incorporates by reference the findings and conclusions of the Arbitrator's Report and Decision, subject to the modifications which are Ordered herein.

13. At an open meeting on April 1, 1997, the Commission approved Sprint's request that the following language be included in Section 31.2.5.1 of the Agreement:

Centrex type services may only be sold to customers qualified to purchase those services pursuant to the USWC tariff.

14. The Commission approved the proposal of the parties to use the ordered and approved American Telephone & Telegraph ("AT&T") rates as interim rates until such time as the Commission issues an order in a generic proceeding, and that USWC move Sprint to such approved rates and true up the amounts charged up to that point in time. In Washington, the AT&T interim rates shall be established in Docket No. 960309 which is presently pending before the Commission. The Commission also approved the agreement between Sprint and USWC to file those rates in this proceeding within ten days of the Commission's order approving the arbitrated interconnection agreement in Docket No. 960309, and the Commission approved the incorporation of those terms into the Agreement by reference.

15. Other than the inclusion of Sprint's proposed language in Section 31.2.5.1, the Commission denied the parties other requests for modification and adopted the Commission Staff recommendation that the Agreement be approved.

CONCLUSIONS OF LAW

1. The provisions of the Agreement meets the requirements of Section 251 of the Telecom Act, including the regulations prescribed by the Federal Communications Commission pursuant to Section 251 which have not been stayed, and the pricing standards set forth in Section 252(d) of the Act.

2. The negotiated provisions of the Agreement do not discriminate against a telecommunications carrier not a party to the agreement, and it is accepted as consistent with the public interest, convenience and necessity.

3. The contract language proposed by Sprint in Section 31.2.5.1 of the Agreement is consistent with the Arbitrator's decision and should be incorporated into the Agreement.

4. The proposal of the parties to use the ordered and approved American Telephone & Telegraph ("AT&T") rates as interim rates until such time as the Commission issues an order in a generic proceeding, and that USWC move Sprint to such approved rates and true up the amounts charged is reasonable and is consistent with the public interest, convenience, and necessity. In Washington, the AT&T interim rates shall be established in Docket No. 960309 which is presently pending before the Commission. It is also reasonable that Sprint and USWC file those rates in this proceeding within ten days of the Commission's order approving the arbitrated interconnection agreement in Docket No. 960309, and that those terms are incorporated into the Agreement by reference.

5. The parties failed to establish a proper foundation in support of their other requests for modification, and the Commission Staff recommendation that the other requests be denied is well founded.

6. The Agreement is otherwise consistent with Washington law and with the orders and policies of this Commission.

ORDER

THE COMMISSION ORDERS:

1. The Agreement filed by the parties on May 19, 1997, is approved subject to the inclusion of Sprint's proposed language in Section 31.2.5.1.

2. USWC shall file a revised Agreement or revised pages for insertion into the Agreement within ten days. The

revised agreement shall be integrated and conform with the Commission's modification of the Arbitrator's Decision.

3. In the event that the parties revise, modify or amend the agreement approved herein, the revised, modified, or amended agreement shall be deemed to be a new negotiated agreement under the Telecommunications Act and shall be submitted to the Commission for approval, pursuant to 47 U.S.C. § 262(e)(1) and relevant provisions of state law, prior to taking effect.

4. The Agreement approved in this Order shall be effective in thirty days.

DATED at Olympia, Washington, and effective this 18th day of June 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHARON L. NELSON, Chairman

RICHARD HEMSTAD, Commission

WILLIAM GILLIS, Commission

APPENDIX J

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960310

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between

MCImetro ACCESS SERVICES, INC. and U S WEST COMMUNICATIONS, INC.

Pursuant to 47 USC Section 252

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contribution to overhead and profit than some other services, but an appropriate wholesale discount should leave U S

WEST with the same contribution from a wholesale transaction as a retail transaction.

Issue 34 MCImetro Prevails.

6. Issue 39: Construction & Other Additional Charges

Issue. Should the Commission permit U S WEST to impose construction charges or any other costs of compliance with the mandatory resale provisions of the Act which U S WEST does not similarly bill its own retail customers?

MCImetro's Position. Costs that U S WEST incurs to construct facilities are presumably included in the prices it charges its customers and, therefore, will be included in the prices it charges its resale customers. U S WEST's contention that these costs represent a "loss" to it is nonsensical. When U S WEST constructs new facilities, it does not demand that end user customers pay "up front" for those facilities. The provisions of the Act and state law which prohibit discrimination require that resellers enjoy the same treatment.

U S WEST's Position. The Arbitrator should rule that the same construction tariff that applies to end users should apply to resellers.

Decision. The actual amount that U S WEST charges end users for new construction is in its tariffs. Those tariff provisions should govern new construction charges for MCImetro when its resells a U S WEST service.

Issue 39 U S WEST Prevails.

IX. STRUCTURAL FACILITIES

A. Inside Plant

1. Issue 9: Types of Equipment

Issue. What equipment is "necessary" for interconnection or access to unbundled network elements?

MCImetro's Position. New entrants should be able to collocate Remote Switching Units because they perform concentrating functions and do not take more space or power than transmission equipment. Collucating remote switching units is a more technically efficient option and is critical for accessing unbundled loops.

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U S WEST's Position. Remote Switching Units are switching equipment, as opposed to transmission or multiplexing equipment, and their primary purpose is not interconnection or access to unbundled elements. Their primary purpose is to switch calls.

The Act. The incumbent must provide space for any equipment "necessary" for interconnection or access to unbundled network elements.

FCC Rules. § 51.5 defines "equipment necessary for interconnection or access to unbundled network elements" simply as equipment "used" to interconnect or gain access.

§ 51.323(c) states: "Nothing in this section requires an incumbent LEC to permit collocation of switching equipment or equipment used to provide enhanced services."

FCC Order. In ¶ 579, the FCC concluded that the broader "used or useful" definition is more consistent with the competitive goals of the Act than the narrow "indispensable" interpretation.

In ¶ 581, the FCC noted that technology is blurring the distinction between switching equipment and multiplexing equipment. It left the issue of whether §251 (c)(6) covers specific switching equipment to the states:

Decision. Neither the Act nor FCC rules require an incumbent to allow a new entrant to collocate switching equipment inside the incumbent's central office. MCImetro has the option of using either subloop unbundling alternatives or direct (copper) cable from U S WEST's

central office to connect customers to a nearby MCImetro switching location. MCImetro and U S WEST should explore other alternatives, such as the use of digital cross connect systems (DCS), to eliminate the need for back to back subscriber loop carrier configurations.

Issue 9 U S WEST Prevails.

2. Issue 11: Direct Collocator-to-Collocator Connections

Issue. Under what conditions must U S WEST allow MCImetro to directly connect its facilities to other collocators?

MCImetro's Position. U S WEST should permit MCImetro to directly interconnect with another collocating carrier through MCImetro facilities.

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Issue 61 MCImetro Prevails.

Issue 64 MCImetro Prevails

Issue 65 MCImetro Prevails

Issue 67 MCImetro Prevails

f) Issues 15 & 84: Loop Conditioning

Issue. Should the basic TELRIC loop price cover loop conditioning?

MCImetro's Position. The cost of conditioning should be included in the TELRIC price of the loop facility. In addition, specific contract provisions are necessary to ensure that MCImetro does not confront unreasonable and costly delays and service problems in the manner in which the loop is provided.

U S WEST's Position. A carrier asking U S WEST to condition loop must pay the cost of conditioning. U S WEST has not developed conditioning prices at this point in time.

FCC Order. In ¶ 380 the FCC includes "conditioned" loops in the definition of the local loop element. In ¶ 382 the FCC recognizes that its definition of the local loop element may require an incumbent to conditioned some loops for a higher level of service. It requires the requesting new entrant to pay the cost of conditioning.

Decision. While the FCC requires an incumbent to condition a loop when it is technically feasible to do so, the FCC also requires the new entrant to pay the cost of conditioning. Since conditioning is a nonrecurring cost with long term benefits, the Commission should decide, as a matter of policy, whether to recover the cost through a nonrecurring charge or a higher recurring rate for higher capacity lines. The Commission will have an opportunity to do so in the generic proceeding. In the mean time, there is no price proposal other than MCImetro's offer and the Arbitrator adopts it.

Issue 15 MCImetro Prevails.

Issue 84 MCImetro Prevails

4. Restrictions

a. Issue 25: Replication of Incumbent Services

Issue. May U S WEST prohibit MCImetro from assembling network elements to replicate existing U S WEST services?

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MCImetro's position. No. The Act does not limit the ability of a new entrant to combine unbundled elements.

U S WEST's Position. No. If the Commission adopts MCImetro's position, MCImetro will be able to order U S WEST to provide a finished retail service but get a cheaper

price than the Act's resale price (retail less cost avoided) by using the fiction that MCImetro is buying unbundled network elements --when in reality there is no unbundling involved and MCImetro is not self-provisioning any elements. In this manner, MCImetro can completely circumvent the resale provisions of the Act—engaging in "sham" unbundling. Sham unbundling could also enable interexchange carriers to avoid paying switched access charges through the purchase of unbundled network elements. Sham unbundling creates significant opportunities for price arbitrage between resale prices and the prices of unbundled elements. It would upset the balance between resale and unbundling which Congress created when it crafted separate and distinct resale and unbundling provisions.

The Act. The incumbent must provide elements in a manner that allows other carriers to combine the elements into telecommunications services. §251(c)(3).

FCC Rules. §51.307(c): interprets the Act as enabling new entrants to assemble network elements into *any* service. §51.309(a) interprets the Act as prohibiting incumbents from restricting use of network elements.

FCC Order. In ¶292, the FCC specifically concluded that the Act does not prevent new entrants from using network elements to replicate incumbent services. ¶322 shows that the FCC was aware of the arbitrage argument.

Decision. There are two problems with U S WEST's argument on this issue:

Relationship Between Elements and Services. Most elements are part of two or more services and most services use two or more elements. There is no direct relationship between, for example, the price for the local loop element and the wholesale price for basic local service. The local loop element additionally creates an opportunity to earn revenues from toll and other services, but requires the purchase of additional elements to provide any service. Many of the

additional elements create opportunities for additional services, but require the purchase of additional elements to provide those services. The indirect relationship between elements and services means that they are not direct substitutes. Since they are not direct substitutes, §251(c)(3) and §251(c)(4) cannot be mutually exclusive.

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Arbitrage. To the extent there is an arbitrage opportunity between elements and services, it is similar to the arbitrage opportunity between apples and oranges. "Sham unbundling" is not a problem.

Issue 25 MCImetro Prevails.

b. Issue 7: Distance Limitations for Mid-Span Meets

Issue. Should the Commission allow U S WEST to place a distance limit on mid-span meets.

MCImetro's Position. The Act does not permit U S WEST to place a distance limit on mid-span meets.

U S WEST's Position. The Commission should not require U S WEST to provide more then one mile of facilities to the meet point. In no case should it provide facilities for more than one half the distance of the route.

FCC Order. In ¶553 the FCC concluded that state commissions are in a better position to determine the appropriate distance an incumbent should build facilities to accommodate interconnection:

Decision. In light of MCImetro's ability to unilaterally select interconnection at any feasible point, and U S WEST's responsibility for the cost of facilities on its side of a meet point, it is reasonable to impose a distance limit on U S WEST's obligation to build facilities to a meet point. U S WEST's proposal of a one-mile limit is reasonable. It also is reasonable for each party to build one-half of the facilities for shorter distances.

Issue 7 U S WEST Prevails.

XI. ANCILLARY FUNCTIONS

A. Availability & Restrictions

1. Issues 70 & 71: Directories

Issue. To what extent should the Commission require U S WEST to provide directory listings, assist MCImetro with Yellow Pages advertising, and distribute directories?

* * * *

APPENDIX K

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960309

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. and U S WEST COMMUNICATIONS, INC.

Pursuant to 47 USC Section 252

ARBITRATOR'S REPORT AND DECISION

I. INTRODUCTION

A. Procedural History

On March 1, 1996, AT&T Communications of the Pacific Northwest, Inc. ("AT&T") requested negotiations with U S WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 USC § 151 et seq. (1996) ("the Act" or "1996 Act").

On July 25, 1996, AT&T timely filed with the Washington Utilities and Transportation Commission

("Commission")[1] and served on USWC a request for arbitration pursuant to 47 USC § 252(b)(1). The matter was designated Docket No. UT 960309. On August 5, 1996, the Commission entered an Order on Arbitration Procedure appointing the undersigned as arbitrator and establishing certain procedural requirements. USWC timely filed its response to the petition.

"Final offer" (or "best and final offer") arbitration was adopted for this arbitration. In preparing the arbitration report in this matter, the arbitrator will select between the parties' last proposals as to each unresolved issue, selecting the proposal which is most consistent with the requirements of state and federal law and Commission policy. The arbitrator will choose either an entire proposal, or choose between parties' proposals on an issue-by-issue basis. In the event that neither proposal is consistent with law or Commission policy, the arbitrator will render a determination in keeping with those requirements.

A hearing was held before the arbitrator on October 21 and 22, 1996, in the

* * * *

[PAGE 5]

"joint forecasting" is required is at odds with the FCC's determination that new carriers should not be required to provide detailed estimates of projected market demand.

Issue No. 4: Two-Way Trunking

AT&T Position

Two-way trunking is technically feasible and should be permitted. AT&T Contract, AT&T.3, Appendix A, §§ 1.1.1 and 1.3.

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[1] In this decision, the WUTC is referred to as the Commission. The Federal Communications Commission is referred to as the FCC.

USWC Position

USWC prefers the use of two-way trunking where technically feasible. Different types of traffic (such as toll and local) should be separated onto different trunk groups. USWC argues that these types of traffic have traditionally been separated because of the different rate structure, a practice which should continue until the opportunity for arbitrage is addressed through a consistent rate structure for both types of traffic.

Arbitrator's Decision

The arbitrator adopts the USWC position.

Discussion

The parties differ primarily on the issue of traffic separation when two-way trunks are used, rather than on the use of two-way trunks per se.[7] The positions are somewhat unclear. On the one hand, it appears to be addressed in the Agreement for Withdrawal. On the other, USWC states that AT&T continues to assert a dispute. AT&T does not address the issue in its brief. The Agreement for Withdrawal appears to clearly provide that separate trunk groups will be established for toll and local traffic. The USWC position is consistent with this provision.

Issue No. 9(a): Types of Collocated Equipment - Switching

AT&T Position

AT&T may collocate the type of equipment it deems necessary, except for large switching equipment such as 5ESS switches. AT&T Contract, AT&T.4, § 2.1. AT&T initially requested the ability to place all such equipment in collocated space. In a spirit

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[7] The issue of traffic separation for trunks is addressed in the Commission's Interconnection Order. *WUTC v. USWC*, UT 941464 *et al.*, Fourth Supplemental Order, October 31, 1995, pp. 46-47 ("WUTC Interconnection Order").

[PAGE 6]

of compromise, AT&T now limits its request to (a) Remote Switching Units (RSUs) and (b) Digital Cross Connect System (DCS), along with the ability to remotely configure DCS. This equipment is useful in interconnection and should be permitted. AT&T Contract, AT&T.4, § 2.2.4. AT&T will agree to not use RSU/RSMs or ORMs for the purpose of bypassing access charges.

USWC Position

Switching equipment is not required to be collocated because it does not meet the "necessary" requirement. *FCC Interconnection Order,* ¶ 581. RSUs are switching equipment that should not be collocated. USWC agrees to allow collocation of DCS.

Arbitrator's Decision

The arbitrator adopts the USWC position.

Discussion

The FCC Interconnection Order , at ¶ 581, declines to "impose a general requirement that switching equipment must be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements." Where, as here, the functionality of the particular equipment is in dispute, the FCC states that "the state commission will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements." The record establishes that the RSU would primarily be used for switching functions rather than interconnection. Tr. 454-457 (Bohling).

Issue No. 9(c): Types of Collocated Equipment - Vendors

AT&T Position

AT&T must have the ability to select its own vendors for installation and engineering of both virtual and physical collocated equipment.

USWC Position

If AT&T wants to use an outside vendor for installation, it may do so, but the vendor must be on USWC's approved list.

Arbitrator's Decision

The arbitrator adopts the AT&T position.

* * * *

[PAGE 12]

a network element. While there is no dispute that dark fiber is not currently being "used" to provide service, this is an overly literal- reading of the statute. Clearly, the purpose of fiber is to be used to provide telecommunications service, as the Commission has recognized.[9] Allowing access to dark fiber is comparable to allowing access to capacity on poles, conduits, or rights-of-way. Issues of technical feasibility can be addressed as they arise. In the meantime, this component of the network should be available to competitors to allow them to provide service. (See discussion at Issue No. 55 - Modification of Facilities).

Issue No. 25: Combinations ("Sham" or "Finished Service" Unbundling)

USWC Position

AT&T should not be permitted to recombine unbundled elements, without using any AT&T facilities, where the recombination does nothing more than rebundle all of the USWC elements of an existing USWC finished service. AT&T may buy the finished service for resale under § 251 (C)(4) of the Act.

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[9] Although the *Electric Lightwave* decision does not directly address the issue presented here, the opinion refers to a determination by the Commission that dark fiber is a telecommunications service. 123 Wn2d at 545. *See also, In re Digital Direct of Seattle, Inc.*, Docket Nos. UT-910776, UT-910777, Fourth Supplemental Order (April 1992).

AT&T Position

AT&T should be permitted to purchase unbundled elements, either individually or in combination, whether or not AT&T provides its own facilities. AT&T Contract, AT&T.5, § 2.

Arbitrator's Decision

The arbitrator adopts the AT&T position.

Discussion

The 1996 Act states, in pertinent part, that it is:

> "The duty [of the incumbent LEC] to provide, to any requesting telecommunications carrier *for the provision of a telecommunications service* ... access to network elements on an unbundled basis[.] An incumbent local exchange carrier shall provide such unbundled network elements in a manner *that allows requesting carriers to combine such elements in order to provide such telecommunications service."* 47 USC § 251(c)(3). (Emphasis added).

[PAGE 13]

The Act, on its face, therefore, appears to expressly permit the combination of elements by a requesting carrier for the purpose of providing a telecommunications service. The FCC takes this view, finding no basis to conclude from the Act's language "a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements." *FCC Interconnection Order,* ¶ 328.[10] Consistent

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[10] *See generally, FCC Interconnection Order,* ¶¶ 329-341. The FCC rejects many of the arguments raised here by USWC, stating, for example:

> We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4)

with this interpretation, the FCC rules permit the combination of unbundled elements by requesting carriers to provide a telecommunications service. 47 CFR § 51.315(a). This section of the FCC rules is not subject to the Eighth Circuit stay.

While USWC makes a number of practical and policy arguments against permitting combination of elements into a "finished service," USWC's primary statutory argument is that Congress' incorporation of distinct resale and unbundling provisions allows the inference that Congress intended the limitation that USWC seeks. It does not identify any language in Section 251(c)(3) which supports imposition of such a restriction on unbundling.

C. Resale (Issue Nos. 27-41)

Issue Nos. 27-28: Services Subject to Resale

USWC Position

USWC will make the following services available for resale (per the matrix): Residence basic exchange, Centrex Plus, Operator Services, Directory Assistance, Optional Calling Plans, Volume Discount Plans, Discounted Feature Packages, Private Line Transport, Negotiated contract arrangements, Business Basic Exchange, PBX Trunks, Frame Relay Service, ISDN, Listings, Features, IntraLATA toll, and WATS. *See also*, Appendix A, p. 5.

While Lifeline, Link-Up, and relay services are listed on the matrix as services that will be not be made available, hearing testimony partially resolved this question. (See discussion section). * * * *

> [resale] if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets[.]

Id., ¶ 331.

APPENDIX L

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DOCKET NO. UT-960347

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between

SPRINT COMMUNICATIONS COMPANY L.P. and U S WEST COMMUNICATIONS, INC.

Pursuant to 47 USC § Section 252.

ARBITRATOR'S REPORT AND DECISION

I. INTRODUCTION

(a) Procedural History

On April 15, 1996, Sprint Communications Company L.P. ("Sprint") requested negotiations with U S WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, codified at 47 USC § 151 et seq. (the "1996 Act" or "the Act")

On September 20, 1996, Sprint timely filed with the Commission and served on USWC a request for arbitration pursuant to 47 USC § 252(b)(1). The matter was designated Docket No. UT-960347. On October 10, 1996, the Commission entered an Order on Arbitration Procedure appointing the undersigned as arbitrator and establishing

certain procedural requirements. USWC timely filed its response to the petition.

"Final offer" arbitration was adopted for this arbitration pursuant to the Arbitrator's Second Procedural Order. In preparing the arbitration report in this matter, the arbitrator will select between the parties' last proposals as to each unresolved issue, selecting the proposal which is most consistent with the requirements of state and federal law and Commission policy. The arbitrator will choose either an entire proposal, or choose between parties' proposals on an issue-by-issue basis. In the event that neither proposal is consistent with law or Commission policy, the arbitrator will render a determination in keeping with those requirements.

A hearing was held before the arbitrator on December 12, 1996, in the Commission's main hearing room in Olympia, Washington. Sprint was represented by Richard L. Goldberg, attorney. USWC was represented by Lisa Anderi, attorney. Following the hearing, the parties filed final briefs and "last best offers" on January 3, 1996.

(b) Eighth Circuit Order and the FCC Rules

As the parties are aware, the FCC rules[1] implementing the local competition provisions of the Act have been appealed and those rules relating to costing and pricing have been stayed by the United States Court of Appeals for the Eighth Circuit.[2] The provisions of the FCC order and rules not subject to stay are adhered to in this report.

II. RESOLUTION OF DISPUTED ISSUES

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[1] In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996, CC Docket No, 96-98, First Report and Order (August 8, 1996), Appendix B - Final Rules.

[2] *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996). The order also stays the "MFN" rule. *See also*, Order Lifting Stay in Part (November 1, 1996) (stay lifted for 47 CFR §§ 51.701, 51.703, and 51.717).

Issue No. 1: "Most Favored Nations" (MFN) Provision

Sprint Position

Sprint takes the position that the language of 47 U.S.C. § 252(i) is clear in requiring that any component of an interconnection agreement be made available to other carriers. Sprint argues that, notwithstanding the Eighth Circuit stay, the Commission is free to adopt an interpretation of the statute consistent with Sprint's position.

USWC Position

USWC disagrees with Sprint's reading of the Act. USWC takes the position that Sprint's (and the FCC's) "pick and choose" interpretation is plainly inconsistent with the Act and undermines the entire negotiation process. It urges the Commission to adhere to the Eighth Circuit stay on this issue. Among other things, USWC points out that the FCC has expanded MFN beyond terms and conditions to include rates, although section 252(i) does not expressly reference rates.

Contract Provision(s)

Section 33.2

Arbitrator's Decision

The arbitrator adopts the USWC position.

Discussion

The "pick and choose" interpretation advocated by Sprint, as noted, has been adopted in the FCC rules 47 CFR § 51.809(a) and stayed by the Eighth Circuit. The arbitrator will adhere to the Eighth Circuit order. While the rule is

stayed, section 252(i) itself applies to the agreement, however, USWC's proposed contract language acknowledges the application of the provision and of any state and federal interpretations in effect from time to time. The language is reasonable.

Issue No. 2: Interim Number Portability (INP); Sharing of Access Revenues

Sprint Position

Sprint advocates that terminating access revenues should be assessed pursuant to meet-point billing arrangements consistent with the FCC Number Portability Order.[3] Sprint urges that, to the extent USWC's entrance facilitates, serving wire center, and access tandem switching are involved in transporting the call to the meet point, USWC should receive access charges and share transport charges with Sprint. To the extent Sprint is providing transport from the meet point, local switching and a line to the end user, Sprint should receive the local switching, residual interconnection charge (RIC), and carrier common line charge, and share transport charges with USWC.

USWC Position

USWC has filed an action in the United States Court of Federal Claims to challenge the Number Portability Order. USWC argues that the FCC Number Portability Order and the Sprint position result in an unconstitutional taking of USWC's property because it requires USWC to provide services and incur costs for which it will not be compensated.

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[3] *In the Matter of Telephone Number Portability*, First Report and Order, CC Docket No. 95-116, FCC 98-286 (released July 2, 1996) (FCC Number Portability Order) ¶ 140.

USWC also argues that its charges for Remote Call Forwarding only recover routing and look-up charges and not switching and transport. For interexchange calling, USWC assesses four charges to the IXC: local transport, local switching, interconnection, and carrier common line charges. While acknowledging that the FCC has mandated a different result, USWC argues that it should be allowed to retain the local switching and local transport charges from IXCs with regard to ported calls. As a compromise, USWC proposes to forward carrier common line charges to Sprint.

Contract Provision(s)

Section 8.1.8

Arbitrator's Decision

The arbitrator adopts the Sprint position.

Discussion

The FCC Number Portability order addresses the appropriate treatment of terminating access charges in the interim number portability context. While the FCC generally approves the model of meet-point billing arrangements between neighboring incumbent LECs, it requires incumbent LECs and competitors to share in the access revenues received for a ported call.

The FCC order states:

> "[W]e direct forwarding carriers and terminating carriers to assess on IXCs charges for terminating access through meet-point billing arrangements . . . . It is up to the carriers whether they each issue a bill for access to one ported call, or whether one of them issues a bill to the IXCs covering all of

> the transferred calls and shares the correct portion of the revenues with the other carriers involved."

Id.

Sprint's contract language is reasonable, based upon the functions and facilities provided by the carrier for call forwarding or termination. This result takes into account the fact that USWC receives compensation for INP costs by means of the Remote Call Forwarding charges agreed to by the parties in this negotiation.

Issue No. 3: Resale Restrictions

In the Arbitrator's Third Procedural Order the parties were directed to clarify whether their resale dispute includes the cross-class selling issue, or extends to the type of services which must be resold. USWC reports in its final brief that the parties have agreed on which services are available for resale and that the voice mail issue is not present in this proceeding.

USWC Position

USWC proposes that its services should be resold only for their "intended or disclosed use" and only to the same class of customers eligible to purchase the service from USWC.

USWC expresses a particular concern with the resale of Centrex service to other than business customers. USWC argues that Centrex was designed for a campus environment in the business market, not for resale to the residential market. USWC sees a potential adverse impact on at least three revenue streams: switched access charges, toll revenue, and features. USWC also argues that Centrex resale in the residential market would be inconsistent with Washington's average pricing philosophy. Finally, USWC notes that the

Commission approved a restriction on resale of Centrex in a recent order.

Sprint Position

Sprint would agree to contract provisions which explicitly reject the resale of residential services to business customers and of lifeline services to eligible users. It objects to USWC's position as unreasonable.

Contract Provision(s)

Section 29.2.5

Arbitrator's Decision

The arbitrator adopts the USWC position, subject to the discussion below.

Discussion

Section 251(c)(4)(B) prohibits unreasonable limitations or conditions on resale. As noted above, the FCC has concluded generally that "resale restrictions are presumptively unreasonable." *FCC Interconnection Order*, ¶ 939. Incumbent LECs can rebut the presumption by showing that the restriction is narrowly tailored. *Id.* The FCC identified only two restrictions it found reasonable: (1) restrictions on resale of short-term promotions; and (2) restrictions on cross-class selling of residential and Lifeline service. *Id.*, ¶ 950, 962. *See also*, 47 CFR § 51.613 (not subject to stay).

The difficulty with USWC's general position is that it appears to permit imposition of restrictions beyond those identified by the FCC.[4] As a practical matter, however,

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[4] Although USWC's proposed contract language can arguably read to be consistent with the Act, the position argued by USWC at hearing and

USWC's concern with resale of business services to the residential class of subscribers is limited to Centrex. Tr. 63-64 (Moran). USWC indicated that it could accept a restriction tailored to Centrex only. Tr. 64 (Moran).

USWC argues that the Eighteenth Supplemental Order in Docket UT-950200 authorized imposition of a requirement that Centrex be sold within class.[5] The Eighteenth Supplemental Order was restating, however, not changing the Fifteenth Supplemental Order in the docket, which had allowed USWC to include a general tariff provision restricting resale out of class. Fifteenth Supplemental Order, Docket No. UT-950200, p. 123. This resale restriction is not specific to Centrex.

Sprint should not be allowed to resell in a way which is prohibited by the USWC tariff. However, based on the hearing testimony, it appears that Centrex resale would not necessarily be subject to the "out of class" restriction in any event. USWC acknowledged that Centrex is not classified by tariff as a business service. Tr. 59-60 (Moran). USWC also conceded that if an apartment owner requested Centrex to serve multiple units in an apartment. USWC's tariff would require them to provide the service. Tr. 61-62 (Moran). Further, USWC stated that if the Commission approves withdrawal of Centrex service with grandfathering of existing customers, USWC would not object to Sprint taking over the Centrex service on a resale basis. Tr. 63 (Moran). Application of the general restriction to the Centrex situation should be interpreted in this light.

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in the briefs makes clear that USWC would interpret the language as permitting broader restrictions than those allowed under the FCC order.

[5] *Washington Utilities and Transportation Commission v. U.S. WEST Communications, Inc.*, Docket No. 950200, Eighteenth Supplemental Order, December 26, 1996, p. 8. *Amended and clarified*, Nineteenth Supplemental Order, December 30, 1996 (modifications not relevant here).

Issue No. 4: "Finished Service" Unbundling

USWC Position

USWC opposes what it terms "sham unbundling," by which means Sprint could purchase unbundled network elements in a manner and form that would enable it to recombine the elements into a "finished service" for resale without providing any of its own facilities. USWC argues that this approach is contrary to the intent of the 1996 Act and would destroy the competitive balance. USWC also expresses a concern that new entrants could purchase the elements necessary to provide access and thereby avoid the payment of access charges to USWC.[6]

USWC acknowledges that the FCC has interpreted the Act to preclude such limitations. In support of its position, USWC cites an amicus brief filed by four Congressmen in the Eighth Circuit appeal. Post-hearing Brief of USWC, p. 17.

Sprint Position

Sprint opposes the adoption of any restrictions on the combination of unbundled elements to provide new service as contrary to the 1996 Act.

Contract Provision(s)

30.1.2

Arbitrator's Decision

The arbitrator adopts the position of Sprint.

Discussion

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[6] The FCC may have addressed this problem in a subsequent Order on Reconsideration in the local competition rules docket. CC Docket No. 96-88, Order On Reconsideration, FCC 96-394 (September 27, 1996).

The 1996 Act states, in pertinent part, that it is:

> "The duty [of the incumbent LEC] to provide, to any requesting telecommunications carrier *for the provision of a telecommunications service*... access to network elements on an unbundled basis[.] An incumbent local exchange carrier shall provide such unbundled network elements in a manner *that allows requesting carriers to combine such elements in order to provide such telecommunications service*." 47 U.S.C. § 251(c)(3) (emphasis added).

The Act, on its face, therefore, appears to expressly permit the combination of elements by a requesting carrier for the purpose of providing a telecommunications service. As Sprint notes, the FCC takes this view, finding no basis to conclude from the Act's language "a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements." *FCC Interconnection Order*, ¶328.[7] Consistent with this interpretation, the FCC rules permit the combination of unbundled elements by requesting carriers to provide a telecommunications service. 47 CFR § 51.315(a). This section of the FCC rules is not subject to the Eighth Circuit stay.

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[7] *See generally, FCC Interconnection Order*, ¶¶ 329-341. The FCC rejects many of the arguments raised here by USWC, stating, for example:

> We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4) [resale] if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets[.]

Id., ¶ 331.

Issue No. 5: Performance Measures and Standards

Sprint Position

Sprint argues that the Act requires USWC to provide parity of service, that is, service at least equal in quality to that which it provides itself. Sprint considers specific, enforceable quality standards an essential component of any contract between an incumbent and new entrant. Standards provide a means to measure whether parity of service is being provided and a means to deter anticompetitive conduct by the incumbent.

Sprint believes the Commission should require USWC to provide Sprint with detailed specifications showing all of its existing service quality and performance standards.

Sprint points out that both parties' witnesses at the hearing recognized the need to continue working to develop performance quality measurements and the utility of having the Commission encourage this process. Sprint expressed its willingness to negotiate with USWC regarding compensation where additional measurements are necessary and additional costs are incurred.

During negotiations, Sprint proposed twenty-one specific performance measures. To date, USWC has agreed to twelve of these.

USWC Position

USWC acknowledges that it must provide Sprint with service equal in quality to that which it provides itself.

It is willing to adopt the twelve agreed quality measures. With respect to the nine disputed measures, USWC argues that Sprint should use the bona-fide request process and pay for the additional cost. To the extent other competitive local exchange carriers want the measure, the additional costs would be shared.

USWC opposes the adoption of the AT&T/Pacific standards submitted in Sprint's final offer as Attachment 17, particularly because they contain liquidated damages provisions.

Contract Provision(s)

Section 31

Arbitrator's Decision

The arbitrator adopts the USWC position, subject to the discussion below.

Discussion

The 1996 Act requires incumbent LECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection." 47 USC § 251(c)(2)(B). This non-discrimination requirement is echoed in the unbundling and resale provisions of the Act. 47 USC § 251(c)(3) and (4).

The FCC interconnection Order concludes that the "equal in quality" standard of section 251(c)(2) requires an incumbent LEC to provide service to a CLEC that is indistinguishable from that it provides itself. The FCC further concludes that this obligation is not limited to the level of quality perceived by end-users, pointing out that such a standard could provide opportunities for discriminatory practices harmful to competitors, though not perceived by end-users, such as in pricing and ordering. *FCC Interconnection Order*, ¶ 224, 314. The FCC also declared the standard to be a minimum and "to the extent a carrier requests interconnection of superior or lesser quality than an incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection arrangement if technical feasible[.] as long as new entrants

compensate incumbent LECs for the economic cost of the higher quality interconnection." *Id.* ¶ 225, 314.

The FCC rules adopted pursuant to the order require the "equal in quality" standard. 47 CFR § 51.311(a). In addition, however, the rules provide that, to the extent technically feasible, the quality of elements and access "shall, upon request, be superior in quality to that which the incumbent LEC provides to itself." 47 CFR § 51.311(c). If the incumbent fails to meet the requirement, it must prove to t he state commission that it is not technically feasible to do so. *Id.*

The precise positions of the parties on this issue were somewhat unclear. This was the case, at least in part, because the proposed contract language did not appear, on either side, to incorporate all the positions set out in the briefs. It is unclear, for example, whether the agreed measures (12 of 21) are reflected in the drafts.

While many of Sprint's points are valid, I am unwilling to require USWC to adopt the standards in Attachment 17 as "parity" standards, nor am I prepared to incorporate the liquidated damage provisions it contains.[8]

The parties are agreed that USWC should provide parity and have agreed to twelve specific performance measures. These terms should be incorporated in the agreement language. The agreement should include a requirement that USWC must provide complete information to Sprint as to its existing standards so that the parties can more readily determine that parity is being offered. As to the remaining nine standards sought by Sprint, or the additional items in Attachment 17, I will accept the USWC testimony that these go beyond parity. These items should be negotiated in a bona-fide request process. The general issue of prices for

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[8] At the hearing, Sprint stated it was not seeking an agreement providing for liquidated damages. Tr. 104-105.

superior levels of service can also be addressed in the generic proceeding.

III. IMPLEMENTATION SCHEDULE

Pursuant to 47 USC § 252(c)(3), the arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." In this case the parties did not submit specific alternative implementation schedules. Specific contract provisions, however, contain implementation timelines. The parties shall implement the agreement pursuant to the schedule provided for in the contract provisions, and in accordance with the 1996 Act, the applicable FCC rules, and the orders of this Commission.

In preparing a contract for submission to the Commission for approval, the parties may include an implementation schedule.

IV. CONCLUSION

The foregoing resolution of the disputed issues in this matter meets the requirements of 47 USC § 252(c).

The parties are directed to submit an agreement consistent with the terms of this report to the Commission for approval within 30 days, pursuant to the following requirements of the Interpretive and Policy Statement.[9]

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[9] *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960259, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration and Approval of Agreements Under the Telecommunications Act of 1996 (June 27, 1996) ("Interpretive and Policy Statement").

Filing and Service of Agreements for Approval

(i) An interconnection agreement shall be submitted to the Commission for approval under Section 252(e) within 30 days after the issuance of the Arbitrator's Report, in the case of arbitrated agreements, or, in the case of negotiated agreements, within 30 days after the execution of the agreement. The 30 day deadline may be extended by the Commission for good cause. The Commission does not interpret the nine month time line for arbitration under Section 252(b)(4)(C) as including the approval process.

(ii) Requests for approval shall be filed with the Secretary of the Commission in the manner provided for in the WAC 480-09-120. In addition, the request for approval shall be served on all parties who have requested service (List available from the Commission Records Center. See Section II.A.2 of the Interpretive and Policy Statement) by delivery on the day of filing. The service rules of the Commission set forth in WAC-480-09-120 and 420 apply except as modified in this interpretive order or by the Commission or arbitrator. Unless filed jointly by all parties, the request for approval and any accompanying materials should be served on the other signatories by delivery on the day of filing.

(iii) A request for approval shall include the documentation set out in this paragraph. The materials can be filed jointly or separately by the parties to the agreement, but should all be filed by the 30 day deadline set out in paragraph 1 above.

Negotiated Agreements

(i) A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified, including a statement as to why the agreement does not discriminate against non-party carriers, is consistent with the public

interest, convenience, and necessity, and is consistent with applicable state law requirements, including Commission interconnection orders.

(ii) A complete copy of the signed agreement, including any attachments or appendices.

(iii) A proposed form of order containing findings and conclusions.

Arbitrated Agreements

(i) A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified; and containing a separate explanation of the manner in which the agreement meets each of the applicable specific requirements of Sections 251 and 252, including the FCC regulations thereunder, and applicable state requirements, including Commission interconnection orders. The "request for approval" brief may reference or incorporate previously filed briefs or memoranda. Copies should be attached to the extent necessary for the convenience of the Commission.

(ii) A complete copy of the signed agreement, including any attachments or appendices.

(iii) Complete and specific information to enable the Commission to make the determinations required by Section 252(d) regarding pricing standards, including but not limited to supporting information for (1) the cost basis for rates for interconnection and network elements and the profit component of the proposed rate, (2) transport and termination charges; and (3) wholesale prices.

(iv) A proposed form of order containing findings and conclusions.

Combination Agreements (Arbitrated/Negotiated)

(i) Any agreement containing both arbitrated and negotiated provisions shall include the foregoing materials as appropriate, depending on whether a provision is negotiated or arbitrated. The memorandum should clearly identify which sections were negotiated and which arbitrated.

(ii) A proposed form of order is required, as above.

(iii) Any filing not containing the required materials will be rejected and must be refiled when complete. The statutory time lines will be deemed not to begin until a request has been properly filed.

Confidentiality

(i) Requests for approval and accompanying documentation are subject to the Washington public disclosure law, including the availability of protective orders. The Commission interprets 47 USC § 252(h) to require that the entire agreement approved by the Commission must be made available for public inspection and copying. For this reason, the Commission will ordinarily expect that proposed agreements submitted with a request for approval will not be entitled to confidential treatment.

(ii) If a party or parties wishes protection for appendices or other materials accompanying a request for approval, the party shall obtain a resolution of the confidentiality issues, including a request for a protective order and the necessary signatures (Exhibits A or B to standard protective order) prior to filing the request for approval itself with the Commission.

Approval Procedure

(i) The request will be assigned to the Commission Staff for review and presentation of a recommendation at the Commission public meeting. The Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act. Staff

who participated in the mediation process for the agreement will not be assigned to review the agreement.

(ii) Any person wishing to comment on the request for approval may do so by filing written comments with the Commission no later than 10 days after date of request for approval. Comments shall be served on all parties to the agreement under review. Parties to the agreement file written responses to comments within 7 days of service.

(iii) The request for approval will be considered at a public meeting of the Commission. Any person may appear at the public meeting to comment on the request for approval. The Commission may in its discretion set the matter for consideration at a special public meeting.

(iv) The Commission will enter an order, containing findings and conclusions, approving or rejecting the interconnection agreement within 30 days of request for approval in the case of arbitrated agreements, or within 90 days in the case of negotiated agreements. Agreements containing both arbitrated and negotiated provisions will be treated as arbitrated agreements subject to the 30 day approval deadline specified in the Act.

Fees and Costs

Each party shall be responsible for bearing its own fees and costs. Each party shall pay any fees imposed by Commission rule or statute.

DATED at Olympia, Washington and effective this 15th day of January 1997.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SIMON J. FITCH
Arbitrator

APPENDIX M

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.98-35819
DC# CV-97-01508-BJR

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation; MCI METRO ACCESS TRANSMISSION SERVICES, INC.,

Plaintiffs-Appellants,

v.

U.S. WEST COMMUNICATIONS, a Colorado corporation; THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION (WUTC); ANNE LEVINSON, Chair; RICHARD HEMSTAD; WILLIAM P. GILLIS, in their official capacities as Commissioners of WUTC,

Defendants-Appellees

AMERITECH CORPORATION, amicus; FEDERAL COMMUNICATIONS COMMISSION, amicus,

Amici Curiae

No. 98-35820
DC# CV-97-01508-BJR

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation; MCI METRO ACCESS TRANSMISSION SERVICES, INC.

Plaintiffs,

v.

U.S. WEST COMMUNICATIONS, a Colorado corporation;

Defendant-Appellant,

THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION (WUTC); ANNE LEVINSON, Chair; RICHARD HEMSTAD; WILLIAM P. GILLIS, in their official capacities as Commissioners of WUTC,

Defendants-Appellees.

No. 98-35822
DC# CV-97-01508-BJR

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation; MCI METRO ACCESS TRANSMISSION SERVICES, INC.

Plaintiffs,

v.

U.S. WEST COMMUNICATIONS, a Colorado corporation; ANNE LEVINSON, Chair; RICHARD HEMSTAD; WILLIAM P. GILLIS, in their official capacities as Commissioners of WUTC,

Defendant-Appellant,

and

THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION (WUTC),

Defendant-Appellant.

ORDER

Before: GOODWIN, SCHROEDER, AND GRABER, Circuit Judges

The panel has voted to deny appellee/cross-appellant's petition for rehearing and to reject the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

The panel has voted to deny appelle/cross-appellant's petition for rehearing and to reject the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35789
D.C. No. CV-97-01320-BJR
(Western Washington)

U S WEST COMMUNICATIONS, INC.,
Plaintiff-Appellee,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Defendant-Appellant.

No. 98-35828
D.C. No. CV-97-01320-BJR

U S WEST COMMUNICATIONS, INC.,
Plaintiff-Appellee/Cross-Appellant,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Defendant-Appellant/Cross-Appellee,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; ANNE LEVINSON, Chairperson; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner,
Defendants-Appellees.

No. 98-35829
D.C. No. CV-97-01320-BJR

U S WEST COMMUNICATIONS, INC.,
Plaintiff-Appellant/Cross-Appellee,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Defendant,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; ANNE LEVINSON, Chairperson; RICHARD HEMSTAD, Commissioner;WILLIAM P. GILLIS, Commissioner,
Defendants-Appellees/Cross-Appellants.

ORDER

Before: GOODWIN, SCHROEDER, and GRABER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are

DENIED.

APPENDIX O

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35821
D.C. No. CV-97-01764-BJR

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiffs-Appellee,

v.

SPRINT COMMUNCATIONS COMPANY L.P. ("SPRINT"), a limited partnership,

Defendant-Appellant,

and

ANNE LEVINSON, Chairwoman; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner, in their official capacities as Commissioners of the Washington Utilities & Transportation Commission; WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Defendants.

No. 98-35823
D.C. No. CV-97-01764-BJR

U S WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff-Appellee,

v.

SPRINT COMMUNICATIONS COMPANY L.P. ("SPRINT"), a limited partnership, ANNE LEVINSON, Chairwoman; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner, in their official capacities as Commissioners of the Washington Utilities & Transportation Commission;

Defendants,

and

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Defendant-Appellant.

ORDER

BEFORE: GOODWIN, SCHROEDER, and GRABER, Circuit Judges

The panel has voted to deny appellee/cross-appellant's petition for rehearing and to reject the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

APPENDIX P

STATUTORY PROVISIONS

47 U.S.C. § 251. INTERCONNECTION.

(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS. -- Each telecommunications carrier has the duty-

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS. -- Each local exchange carrier has the following duties:

(1) RESALE. - The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) NUMBER PORTABILITY. - The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) DIALING PARITY. - The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the

duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) ACCESS TO RIGHTS-OF-WAY. - The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) RECIPROCAL COMPENSATION. - The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) ADDITIONAL OBLIGATION OF INCUMBENT LOCAL EXCHANGE CARRIERS. - In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) DUTY TO NEGOTIATE. - The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) INTERCONNECTION. - The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network-

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) UNBUNDLED ACCESS. - The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) RESALE. - The duty-

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, Prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such to a different category of subscribers.

(5) NOTICE OF CHANGES.-The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) COLLOCATION. - The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) IMPLEMENTATION. -

(1) IN GENERAL. - Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary

to establish regulations to implement the requirements of this section.

(2) ACCESS STANDARDS. - In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether-

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) PRESERVATION OF STATE ACCESS REGULATIONS. - In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that-

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) NUMBERING ADMINISTRATION. -

(1) COMMISSION AUTHORITY AND JURISDICTION. - The Commission shall

create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) COSTS. - The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS. -

(1) EXEMPTION FOR CERTAIN RURAL TELEPHONE COMPANIES-

(A) EXEMPTION.-Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) STATE TERMINATION OF EXEMPTION AND IMPLEMENTATION SCHEDULE.-The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State Commission receives notice of the request, the State Commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) LIMITATION ON EXEMPTION. .- The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunication service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL

CARRIERS. - A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State for a suspension or modification of the application of a requirement or requirement of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State Commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification-

(A) is necessary

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;
(ii) to avoid imposing a requirement that is unduly economically burdensome; or
(iii) to avoid imposing a requirement that is technically infeasible; and
(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirements or requirements to which the petition applies with respect to the petition carrier or carriers.

(g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS. - On and after the date of enactment of the

Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carriers on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER. -

(1) DEFINITION. - For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that-

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS. - The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if-

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) SAVINGS PROVISION. - Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

47 U.S.C. § 252. PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS.

(a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATIONS. -

(1) VOLUNTARY NEGOTIATIONS. - Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) MEDIATION. - Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION.-

(1) ARBITRATION. - During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) DUTY OF PETITIONER .-

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State

commission all relevant documentation concerning-

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) OPPORTUNITY TO RESPOND. - A non-petitioning party to a negotiation under this section may respond to the other party' s petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) ACTION BY THE STATE COMMISSION.-

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission,

then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth on the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) REFUSAL TO NEGOTIATE.-The refusal of any other party to the negotiate to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) STANDARDS FOR ARBITRATION. - In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall-

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) PRICING STANDARDS.-

(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES.-Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section-

(A) shall be-

(i) based on the cost (determined without reference to a rate-of-return or other rate based proceeding the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.-

(A) IN GENERAL.-For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation tσ be just and reasonable unless-

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the carriers; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) RULES OF CONSTRUCTION. - This paragraph shall not be construed-

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.-For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) APPROVAL BY STATE COMMISSION.-

(1) APPROVAL REQUIRED.-Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) GROUNDS FOR REJECTION.-The State commission may only reject

(A) an agreement. (or any portion thereof) adopted by negotiation under subsection (a) if it finds that-

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) PRESERVATION OF AUTHORITY. - Notwithstanding paragraph (2) but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing

other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) SCHEDULE FOR DECISION.-If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) COMMISSION TO ACT IF STATE WILL NOT ACT. - If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for State commission.

(6) REVIEW OF STATE COMMISSION ACTIONS. - In a case in which a State fails to act as described in paragraph (5), the proceeding by the commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for State commission's failure to act. In any case in which a State

commission make a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this section.

(f) STATEMENTS OF GENERALLY AVAILABLE TERMS.-

(1) IN GENERAL.-A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) STATE COMMISSION REVIEW. - A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) SCHEDULE FOR REVIEW. - The State commission to which a statement is submitted, not later than 60 days after the date of such submission-

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for review; or

(B) permit such statement to take effect.

(4) AUTHORITY TO CONTINUE REVIEW.-Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) DUTY TO NEGOTIATE NOT AFFECTED.-The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) CONSOLIDATION OF STATE PROCEEDINGS.-Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) FILING REQUIRED.-A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and

copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and non-discriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS.-A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.- For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

47 U.S.C. § 260. PROVISION OF TELEMESSAGING SERVICE.

(a) NONDISCRIMINATION SAFEGUARDS.-Any local exchange carrier subject to the requirements of section 251(c) that provides telemessaging service-

(1) shall not subsidize its telemessaging service directly or indirectly from its telephone exchange service or its exchange access; and

(2) shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services.

(b) EXPEDITED CONSIDERATION OF COMPLAINTS. - The Commission shall establish procedures for the receipt and review of complaints concerning violations of subsection (a) or the regulations thereunder that result in material financial harm to a provider of telemessaging service. Such procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, the Commission shall, within 60 days after receipt of the complaint, order the local exchange carrier and any affiliates to cease engaging in such violation pending such final determination.

(c) DEFINITION.-As used in this section, the term "telemessaging service" means voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services.

7 U.S.C. § 261. EFFECT ON OTHER REQUIREMENTS.

(a) COMMISSION REGULATIONS.-Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such

regulations are not inconsistent with the provisions of this part.

(b) EXISTING STATE REGULATIONS.-Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) ADDITIONAL STATE REQUIREMENTS. - Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

APPENDIX Q

REGULATORY PROVISION

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47 C.F.R § 51.315

§ 51.315 Combination of unbundled network elements.

(a) An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service.

(b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.

(c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even of those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:

(1) Technically feasible; and

(2) Would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.

(f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commission that the requested combination would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

(2)

No. 00-214

Supreme Court, U.S.
FILED
OCT 10 2000
CLERK

IN THE

Supreme Court of the United States

QWEST CORPORATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

AT&T COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

SPRINT COMMUNICATIONS CO. L.P., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") correctly applied this Court's interpretation of Section 251(c)(3) of the Telecommunications Act of 1996 ("Act") in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), in upholding interconnection agreement provisions that require U S West to combine network elements ("UNEs") upon request.

2. Whether the Ninth Circuit correctly upheld interconnection agreement provisions that require U S West to permit collocation of remote switching units that are "necessary" for new entrants to gain access to UNEs, as provided under Section 251(c)(6) of the Act.

3. Whether the Ninth Circuit properly discharged its judicial review function under Section 252(e)(6) of the Act in determining *de novo* that the challenged agreement provisions ordered by the Washington state commission were consistent with, and did not violate, the requirements of the Act.

RULE 29.6 STATEMENT

In accordance with Rule 29.6 of the Rules of this Court, Sprint Communications Company L.P. ("Sprint") states as follows:

Sprint is a wholly-owned subsidiary of Sprint Corporation, a corporation organized for the purpose of engaging in telecommunications and related businesses and is publicly traded under the names of Sprint FON and Sprint PCS. In addition, Deutsche Telekom and France Télécom, both of which have issued publicly traded stock, each own a ten percent (10%) share of Sprint Corporation.

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PRELIMINARY STATEMENT

Respondent Sprint Communications Company L.P. ("Sprint") respectfully opposes the Petition of Qwest Corporation (formerly known as U S West Communications, Inc.) ("U S West") for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

U S West seeks review of the Ninth Circuit's rulings that two "interconnection agreement" provisions approved by the Washington Utilities and Transportation Commission ("WUTC") are lawful under the Telecommunications Act of 1996 (the "Act").[1] One provision requires U S West, which is the incumbent local exchange carrier ("ILEC" or "incumbent LEC") in the state of Washington, to combine unbundled network elements ("UNEs") upon request for a competitive local exchange carrier ("CLEC") ("combinations provision"). Petitioner's Appendices ("App.") at 8a. The other provision requires U S West to allow CLECs to collocate remote switching units ("RSUs") in U S West's network ("collocation provision"). *Id.* at 10a.[2] The WUTC relied on implementing regulations promulgated by the Federal Communications Commission ("FCC") in ordering these agreement provisions. Before the case reached the Ninth Circuit, the FCC regulations on combinations were vacated by the Eighth Circuit and the FCC regulations on collocation were partially vacated by the District of Columbia Circuit. The Ninth Circuit thus interpreted the Act *de novo* in

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[1] Pub. L. No. 104-104, 100 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*).

[2] Collocation "refers to an ILEC's obligation under the [Act] to permit CLECs to install equipment on the ILEC's property in order to connect to the ILEC's existing network." App. at 10a.

reviewing and upholding the agreement provisions. *Id.* at 5a-6a.

A. U S West Challenges Three Separate Interconnection Agreements.

The parties' interconnection agreements resulted from separate arbitrations before the WUTC that were commenced in 1996 between U S West and three CLECs: Sprint, MCImetro Access Transmission Services, Inc. ("MCI") and AT&T Communications of the Pacific Northwest, Inc. ("AT&T"). All three interconnection agreements contain a combinations provision. The MCI and AT&T interconnection agreements also contain a collocation provision.[3]

B. The Proceedings Below.

1. The Agreements Properly Require U S West to Combine Network Elements Upon Request.

To facilitate entry of new competitors into local telephone markets, Section 251(c)(3) of the Act requires an ILEC to provide "nondiscriminatory access to network elements on an unbundled basis . . . in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service." 47 U.S.C. § 251(c)(3). The FCC concluded that this statutory language requires ILECs to provide UNEs in combined form when requested by a CLEC, and issued regulations implementing that requirement as part of its Local Competition Order. *See* 47 C.F.R. §§ 51.315(b)-(f) (1999) ("Rules 315(b)-(f)")[4]; *Implementation of the Local*

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[3] Sprint supported the collocation provisions as *amicus curiae* before the Ninth Circuit and addresses the issue here as Respondent pursuant to Supreme Court Rules 12.6 and 15.1.

[4] Rule 315(b) prohibits incumbent LECs from separating requested network elements that the incumbent LEC currently combines. Rules 315(c)-(d) require an incumbent LEC to perform the functions necessary

Competition Provisions in the Telecomms. Act of 1996, 11 F.C.C.R. 15499, 15647-49 (¶¶ 293-297) (1996) ("Local Competition Order").

a. The WUTC And District Court Proceedings.

In the arbitration proceedings before the WUTC, U S West challenged the UNE combinations requirement, arguing that it would permit CLECs to engage in "sham unbundling" by purchasing all of the elements necessary to provide retail services (*i.e.*, "the UNE platform") at cost-based rates rather than at the wholesale rates for the same services when purchased for resale. App. at 113a-115a, 121a-123a, 132a-133a. The WUTC rejected U S West's "sham unbundling" claim and upheld the combinations provisions as consistent with Section 251(c)(3) of the Act. *See, e.g., id.* at 133a ("The Act, on its face, therefore, appears to expressly permit the combination of elements by a requesting carrier for the purpose of providing a telecommunications service.").

After the arbitrations were completed, the Eighth Circuit ruled on multiple challenges to the Local Competition Order. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Among other things, the Eighth Circuit invalidated Rules 315(b)-(f), holding that Section 251(c)(3) "unambiguously indicates that requesting

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to combine UNEs, provided such combination is technically feasible and does not impair the ability of other carriers to obtain access to UNEs or interconnect with the incumbent LEC's network. Rules 315(e)-(f) place the burden on the incumbent LEC to prove to the state commission that the requested combination is not technically feasible or would impair the ability of other carriers to obtain access to UNEs or interconnect with the incumbent LEC's network.

carriers will combine the unbundled elements themselves." *Id.* The Eighth Circuit further concluded that the term "unbundled" could only mean physically separated, and held that any rule which imposes a duty on incumbent LECs to provide combinations of UNEs—either by prohibiting them from separating already combined elements or by requiring them to combine elements upon request—would violate the Act. *Id.*

The district court subsequently vacated the combinations provisions. Relying on the Eighth Circuit's interpretation of Section 251(c)(3), the district court held that "[r]equiring ILECs, at cost-based rates, to combine or not to separate already combined network elements violates the Act." *See, e.g.*, App. at 83a (citations omitted).

b. The Ninth Circuit Proceedings.

While the case was pending before the Ninth Circuit, this Court rendered its *IUB* decision. The Court rejected the Eighth Circuit's conclusion that Section 251(c)(3) only allows the leasing of "discrete pieces" of an incumbent LEC's network. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 393-95 (1999) ("*IUB*"). The Court also rejected the argument of U S West and some other incumbent LECs that the term "unbundled," as used in Section 251(c)(3), means "physically separated." Section 251(c)(3), this Court explained, "does not say, or even remotely imply, that elements *must* be provided only in this fashion and never in combined form." *Id.* at 394 (emphasis in original). Rather, the Court found that the statutory language was ambiguous. *Id.* The Court upheld the FCC's requirement in Rule 315(b) that incumbent LECs provide access to existing combinations of network elements, finding that the requirement was a reasonable interpretation of Section 251(c)(3) and would prevent incumbent LECs from separating already combined UNEs simply to increase

their rivals' costs. *Id.* at 395. The Court did not address Rules 315(c)-(f) in its opinion.

The Ninth Circuit recognized that Rules 315(c)-(f) were vacated and that it lacked jurisdiction to consider their validity in this action. The Ninth Circuit thus relied on this Court's interpretation of Section 251(c)(3) in determining the lawfulness of the challenged combinations provisions. The Ninth Circuit explained its decision as follows:

> The Eighth Circuit's decision to vacate the FCC regulation certainly still stands, and is immune under the Hobbs Act from collateral attack. . . . All this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination. Our task is to determine whether such a provision "meets the requirements" of the Act, i.e., to decide whether a provision requiring combination violates the Act. The Supreme Court's interpretation of the Act makes absolutely clear that it does not, and we have already so held.

App. at 9a (citations omitted).

2. The AT&T And MCI Agreements Properly Require U S West To Collocate Remote Switching Units On Its Premises.

Section 251(c)(6) of the Act requires ILECs to permit physical collocation of equipment "necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). In its Local Competition Order, the FCC interpreted "necessary" to mean "used" or "useful" for either interconnection or access to UNEs, but declined to impose a general requirement that switching equipment must be collocated. Local Competition Order, 11 F.C.C.R. at 15794-96 (¶¶ 579-581). The FCC instead left it to the state commissions to decide on a case-by-case basis whether the

switching equipment at issue would actually be used for interconnection or access to UNEs. *Id.*

a. The WUTC And District Court Proceedings.

In the arbitration proceedings before the WUTC, the Arbitrator recommended that U S West not be required to allow collocation of RSUs, which perform switching functions, in the absence of an FCC regulation requiring it. *See, e.g.*, App. at 120a. The WUTC declined to adopt this recommendation, finding that without RSUs the CLECs would be at a technical and economic disadvantage in the transmission and routing of telephone service. *See, e.g., id.* at 94a. The WUTC thus determined that "RSUs are equipment necessary for interconnection or access to [UNEs] at the premises of the [ILEC]." *Id.*

The district court upheld the collocation provisions. After noting that the FCC left it to state commissions to determine whether the equipment at issue meets the "necessary" requirements of Section 251(c)(6), the district court concluded that the WUTC's factual finding that RSUs were necessary "was neither arbitrary nor capricious, was based on sufficient evidence, and was within the WUTC's discretion to decide." *Id.* at 66a.

b. The Ninth Circuit Proceedings.

In its *IUB* decision, this Court vacated FCC regulations implementing the UNE access standards of Section 251(d)(2). The Court held that the FCC had failed to give proper limiting effect to the statutory terms "necessary" and "impair" in determining which UNEs were subject to unbundled access. *IUB*, 525 U.S. at 387-92. Shortly after that decision, the FCC issued new collocation regulations clarifying that Section 251(c)(6) requires incumbent LECs to permit collocation of any equipment that is "necessary" for either interconnection or access to UNEs, regardless of whether

such equipment includes a switching functionality, provides enhanced services capabilities, or offers other functionalities. *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 14 F.C.C.R. 4761, 4776-77 (¶ 28) (1999) ("Collocation Order"). On Hobbs Act review of the Collocation Order, the District of Columbia Circuit held that the FCC's interpretation of "necessary" under Section 251(c)(6) "seem[ed] overly broad and disconnected from [that provision's] statutory purpose," for the same reasons this Court found in vacating the FCC's UNE access standards under Section 251(d)(2). *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000) ("*GTE*"). The District of Columbia Circuit instructed the FCC on remand to refine its collocation equipment requirements "within the limits of 'the ordinary and fair meaning'" of "necessary." *Id.* at 424 (quoting *IUB*, 525 U.S. at 390). Notably, the District of Columbia Circuit did not vacate the entire Collocation Order but preserved the requirement that collocation be provided for equipment that meets the "necessary" standard of Section 251(c)(6). As explained by the District of Columbia Circuit:

> We do not mean to vacate the Collocation Order to the extent that it merely requires [incumbent] LECs to provide collocation of competitors' equipment that is directly related to and thus necessary, required, or indispensable to "interconnection or access to unbundled network elements."

Id.[5]

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[5] On August 10, 2000, the FCC adopted a proposed rulemaking in response to the District of Columbia Circuit's opinion in *GTE*. *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, CC Docket No. 98-147, 2000 FCC LEXIS 4208 (Aug. 10, 2000). The FCC has invited comment on the remanded issues, including the meaning

The Ninth Circuit addressed these developments in ruling on the lawfulness of the challenged collocation provisions. The Ninth Circuit recognized that it could not uphold the provisions based on the WUTC's determination that the RSUs were "necessary," because the "necessary" standard (or lack thereof) employed by the FCC in establishing the UNE access guidelines for state commissions had been discredited by this Court. App. at 10a. The Ninth Circuit thus interpreted Section 251(c)(6) *de novo* and held that the collocation provisions were valid under the Act. The Ninth Circuit explained its holding as follows:

> Here, our task is not to examine possible flaws in the WUTC's decision-making process, but to decide whether a provision resulting from that process—the provision requiring collocation—has resulted in an agreement that fails to "meet the requirements" of the [Act]. 47 U.S.C. § 252(e)(6). Although the Act may not require the provision, it certainly does not proscribe it. Sections 251 and 252 of the Act are designed to provide some flexibility in fixing the provisions of interconnection agreements. Hence, we conclude that the provision is valid and affirm the district court.

Id. at 11a.

SUMMARY OF ARGUMENT

The first two questions presented in U S West's Petition are premised on the erroneous claim that the Ninth Circuit invaded the Hobbs Act jurisdiction of the Eighth and District of Columbia Circuits by upholding the challenged agreement

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of "necessary" as used in Section 251(c)(6), and will issue revised rules on collocation.

provisions. *See* Petition ("Pet.") at 3-4, 10-19. The Ninth Circuit acknowledged that it lacked jurisdiction under the Hobbs Act to consider the validity of the FCC regulations vacated by other federal courts of appeals. App. at 8a-11a. At the same time, the Ninth Circuit was charged under Section 252(e)(6) of the Act to review the agreement provisions and to determine whether they comported with the Act's requirements. *Id.* at 5a, 9a, 11a. The Ninth Circuit thus interpreted the relevant portions of the Act independently from the vacated FCC regulations, and determined that the challenged agreement provisions complied with the Act's requirements. *Id.* at 9a-11a. Nothing in the Hobbs Act precluded the Ninth Circuit from exercising this review authority under Section 252(e)(6).[6]

U S West further contends that the Ninth Circuit's rulings conflict with the rulings of the Eighth and District of Columbia Circuits vacating the FCC regulations. Pet. at 11. In affirming the combinations provisions, the Ninth Circuit applied this Court's holding in *IUB* that the language of Section 251(c)(3) was "ambiguous" and could be fairly interpreted to prevent anti-competitive conduct. App. at 9a. The Eighth Circuit subsequently held, on remand from *IUB*, that the same statutory language was "plain" and could not be read to require combinations of UNEs. *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 759 (8th Cir. 2000) ("*IUB II*"). Although these holdings reflect a split between the circuits, Sprint

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[6] This Court recently denied U S West's Petition for a Writ of *Certiorari* to the Ninth Circuit in a case upholding similar UNE combinations provisions. *U S W. Communications, Inc. v. MFS Intelenet, Inc.*, 120 S. Ct. 2741 (2000), *reh'g denied*, No. 99-1641, 2000 U.S. LEXIS 4829 (U.S. Aug. 28, 2000). That petition made essentially the same Hobbs Act arguments made here and specifically identified these cases as additional examples of alleged "error" by the Ninth Circuit.

respectfully believes that the Ninth Circuit's analysis correctly followed this Court's interpretation of the Act. Moreover, the Ninth Circuit's ruling involves only the WUTC and four private parties, whereas the Eighth Circuit's decision involves agency rules of nationwide application in a case where the FCC, scores of state commissions, telephone carriers, and other interested parties are present. For these reasons, the latter case is the far more compelling one for this Court to review the combinations issue.

No similar split of authority is presented on the collocation issue. The District of Columbia Circuit partially vacated the FCC's collocation regulations because the agency had failed to give proper effect to the statutory standards prescribed by Congress. *GTE*, 205 F.3d at 422-24. In the absence of a valid regulation, the Ninth Circuit interpreted the statutory standards independently and determined that the collocation provisions ordered by the WUTC were consistent with them. Nothing in the District of Columbia Circuit's decision conflicts with that determination.

In its remaining question, U S West wrongly contends that the Ninth Circuit's ruling gives state commissions unbridled regulatory power to expand upon the duties and requirements imposed under the Act and FCC regulations. Pet. at 20-24. The Act vests regulatory authority in state commissions that choose to participate in the statutory scheme; however, their exercise of that regulatory authority is subject to federal court review. This Court has previously noted that this review scheme ensures that state commissions "hew" the lines drawn by Congress and the FCC in exercising regulatory authority under the Act. *IUB*, 525 U.S. at 378 n.6. The Ninth Circuit properly discharged that oversight function here by ensuring that the agreement provisions ordered by the WUTC complied with the Act's requirements.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT CORRECTLY FOLLOWED THIS COURT'S *IUB* DECISION IN UPHOLDING THE COMBINATIONS PROVISIONS AND ANY REVIEW OF THE ACT'S UNE COMBINATIONS REQUIREMENTS SHOULD BE MADE ON *CERTIORARI* FROM THE EIGHTH CIRCUIT'S CONTRARY RULING IN *IUB II*.

U S West wrongly argues that the Ninth Circuit invaded the Eighth Circuit's Hobbs Act jurisdiction over Rules 315(c)-(f) by affirming the challenged combinations provisions. Because Rules 315(c)-(f) required incumbent LECs to combine UNEs upon request, U S West contends that the Eighth Circuit's vacation of the regulations precludes other federal courts from upholding any similar requirements in an interconnection agreement. Pet. at 11-15.

U S West's argument misapprehends both the scope of the Eighth Circuit's Hobbs Act jurisdiction and the review authority Congress vested in the federal courts under Section 252(e)(6) of the Act. The Eighth Circuit undoubtedly had exclusive jurisdiction under the Hobbs Act to determine the validity of the FCC's regulations in the direct appeal of the Local Competition Order. *See* 28 U.S.C. § 2342; 47 U.S.C. § 402(a). Even so, the Hobbs Act did not vest the Eighth Circuit with exclusive authority to interpret every provision of the Act addressed in the FCC's regulations. To the contrary, Congress vested the federal district courts with original jurisdiction under Section 252(e)(6) to determine whether the provisions of particular interconnection agreements "meet the requirements" of the Act. 47 U.S.C. § 252(e)(6). Although valid FCC regulations setting forth the requirements of the Act would have binding effect on state commissions and on the district courts in these proceedings, *see U S W. Communications, Inc. v. MFS Intelenet, Inc.*, 193

F.3d 1112, 1123 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000), *reh'g denied*, No. 99-1641, 2000 U.S. LEXIS 4829 (U.S. Aug. 28, 2000), nothing in the Hobbs Act gives a single federal court of appeals authority to interpret the Act's requirements in the absence of such regulations.

The Ninth Circuit understood this distinction and properly exercised its review authority under Section 252(e)(6). After noting that the Eighth Circuit's vacation of Rules 315(c)-(f) was "immune" from collateral attack under the Hobbs Act, the Ninth Circuit limited its consideration to the validity of the challenged provisions of the parties' interconnection agreements. App. at 9a. As the Ninth Circuit explained, Section 252(e)(6) "makes clear that review in federal court is restricted to the determination of whether the terms of the agreement violate any of the Act's requirements." *Id.* at 5a. The Ninth Circuit correctly followed this Court's *IUB* decision, the most authoritative pronouncement of the Act's requirements, in evaluating the combinations provisions challenged by U S West. *Cf. Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (the Supreme Court's construction of a rule of federal law requires every court to give full and immediate effect to that decision in all pending cases); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) (same). In restoring Rule 315(b), this Court held that the language of Section 251(c)(3) was ambiguous and could reasonably be interpreted to prevent incumbent LECs from separating already combined UNEs. Indeed, the Court noted that the only reason an incumbent LEC would ever separate already combined elements would be "'to impose wasteful reconnection costs on new entrants,'" and that the FCC was right to prohibit such "an anticompetitive practice." *IUB*, 525 U.S. at 394-95 (citations omitted).

The same competitive concerns identified by this Court in *IUB* support a requirement that incumbent LECs combine UNEs when requested by CLECs. Requiring ILECs to

combine UNEs is simply the "flip side" of prohibiting them from separating already combined UNEs: the only reason an ILEC would refuse to combine UNEs would be to impose unnecessary burdens and costs on CLECs. ILECs routinely combine UNEs and, because they control their networks, can do so much more efficiently than a CLEC. As long as the ILEC is fairly compensated for providing UNE combinations, there is no reason that CLECs should be forced to bear the additional costs, logistical delays, maintenance difficulties, and other burdens of attempting to combine elements on another carrier's network. A CLEC's "combining" costs will always be greater than the "combining" costs for the ILEC, even though the same service is being performed. These extra costs would be pure economic waste borne exclusively by the CLEC.

The Ninth Circuit recognized that the same competitive concerns underlying Rule 315(b) supported the combinations provisions ordered by the WUTC, and concluded that this Court's interpretation of Section 251(c)(3) in *IUB* "makes absolutely clear" that imposing such requirements on ILECs does not violate the Act. The Ninth Circuit had jurisdiction under Section 252(e)(6) to make this determination and correctly followed this Court's *IUB* decision in doing so. For these reasons, the Ninth Circuit's combinations ruling presents no issue that warrants this Court's review.

The Eighth Circuit's subsequent decision on remand from *IUB* creates a split of authority on the proper interpretation of Section 251(c)(3). Despite this Court's holding that the language of Section 251(c)(3) is "ambiguous" and can be reasonably interpreted to prevent anti-competitive conduct, the Eighth Circuit reaffirmed its vacation of Rules 315(c)-(f) on the ground that the "plain language" of the statute must be read to require requesting carriers themselves to "combine previously uncombined network elements." *IUB II*, 219 F.3d at 759. Sprint respectfully submits that the Eighth Circuit's

holding is incompatible with this Court's *IUB* decision and wrongly decided.[7] Sprint understands that the FCC and other parties are petitioning for a writ of *certiorari* to the Eighth Circuit for review of this and other issues decided in *IUB II*.[8] That case is a more appropriate one for this Court to address the split of authority on the Act's UNE combinations requirements. Resolving the issue is of paramount importance to new entrants, who must make informed business judgments whether to lease UNEs or to seek other means of competitive entry. State commissions also need guidance in deciding combinations disputes in ongoing and future interconnection arbitrations. *IUB II* involves FCC regulations with nationwide application, and most telecommunications carriers, all fifty state commissions, the FCC, industry associations, and consumer groups are parties. Review of the combinations question there will afford this Court the broadest perspective of the competing issues and give the greatest number of parties a chance to participate. In contrast, this appeal arises from individual arbitrations involving one state commission and four private parties, and is limited to specific interconnection agreement provisions of two or three years' duration. For all these reasons, the combinations issue should be reviewed by this Court in *IUB II*, not in this appeal.

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[7] Since the Eighth Circuit issued *IUB II* on July 18, 2000, at least one other federal circuit court of appeals and one federal district court have upheld "combinations" provisions based on this Court's interpretation of the Act. *See Southwestern Bell Tel. Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 820-21 (5th Cir. 2000); *U S W. Communications, Inc. v. Hix*, Civ. No. 97-D-152 (consol.), Order (D. Colo. Aug. 25, 2000).

[8] The petitions will be filed on or before October 16, 2000.

II. THE NINTH CIRCUIT PROPERLY EXERCISED ITS REVIEW AUTHORITY UNDER SECTION 252(e)(6) IN RULING ON THE COLLOCATION PROVISIONS AND ITS DECISION DOES NOT CREATE A SPLIT OF AUTHORITY WITH THE DISTRICT OF COLUMBIA CIRCUIT.

U S West also wrongly argues that the Ninth Circuit invaded the Hobbs Act jurisdiction of the District of Columbia Circuit by ruling on the challenged collocation provisions. Consistent with its review authority under Section 252(e)(6), the Ninth Circuit evaluated the collocation provisions in the MCI and AT&T interconnection agreements to determine whether they violated Section 251(c)(6) of the Act. The Ninth Circuit interpreted the statutory requirements *de novo*, affording no deference to the WUTC's interpretation of the Act. App. at 10a-11a. Indeed, the Ninth Circuit recognized that the WUTC had relied on a faulty definition of the "necessary" standard and thus excluded the agency's "decision-making process" from its analysis of the lawfulness of the collocation provisions. *Id.* This review, like the Ninth Circuit's review of the combinations provisions, was properly confined under Section 252(e)(6) and in no way invaded the jurisdiction of the District of Columbia Circuit to review the FCC's Collocation Order under the Hobbs Act.

U S West's claim that the Ninth Circuit's ruling "conflicts" with the District of Columbia's vacation of the Collocation Order is equally flawed. The District of Columbia Circuit remanded the Collocation Order to the FCC because the agency had failed to give proper limiting effect to Section 251(c)(6)'s "necessary" standard for collocation. Even so, the District of Columbia Circuit preserved the Collocation Order "to the extent it merely requires [incumbent] LECs to provide collocation of competitors' equipment that is directly related to and thus necessary . . ." for interconnection or UNE

access. *GTE*, 205 F.3d at 424. The District of Columbia Circuit did not rule that RSUs fail to meet the statutory requirements for collocation generally, much less that the particular RSUs at issue here were not "necessary" within the meaning of Section 251(c)(6). The Ninth Circuit is the only circuit court to consider that latter issue and it did so based on an independent interpretation of Section 251(c)(6) and the evidence presented in the parties' individual arbitrations. App. at 10a-11a. The Ninth Circuit's ruling poses no conflict with—but indeed is expressly contemplated by—the District of Columbia Circuit's partial vacation of the Collocation Order.

There is similarly no basis for U S West to suggest that the RSUs at issue would not qualify for collocation, under revised FCC regulations that give proper effect to Section 251(c)(6)'s "necessary" standard, in circumstances like those presented to the Ninth Circuit.[9] Moreover, U S West may always seek relief by petitioning the WUTC to reopen the interconnection proceedings, should U S West believe that any revised collocation regulations issued by the FCC

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[9] Ironically, U S West argues that the Ninth Circuit's collocation ruling also conflicts with this Court's vacation of 47 C.F.R. § 51.319 in *IUB* for lack of a proper "necessary" standard for UNE access. Rather than advancing U S West's argument, the subsequent history of Rule 319 demonstrates that this type of issue is not appropriate for the Court's consideration. On remand from *IUB*, the FCC reissued Rule 319 based on a more narrow definition of "necessary." Of the seven UNEs listed in the original, vacated Rule 319, six were included in the revised Rule 319. *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 15 F.C.C.R. 3696 (1999). Likewise, there is no reason to presume that RSUs will not continue to qualify for collocation, under circumstances similar to those presented here, when the FCC issues revised collocation regulations on remand from the District of Columbia Circuit.

invalidate the challenged collocation provisions. Wash. Rev. Code §§ 80.36.110, 80.36.140, 80.36.330 (2000). Finally, because the FCC's revised collocation rules will govern in any future state commission arbitrations and resulting federal court challenges, a ruling by this Court on the challenged provisions would likely have only limited effect and be quickly superseded by the new regulations. The Ninth Circuit's collocation decision, therefore, presents no issue meriting review by this Court.

III. THE NINTH CIRCUIT DID NOT DELEGATE "UNBOUNDED" FEDERAL AUTHORITY TO THE WUTC IN UPHOLDING THE CHALLENGED AGREEMENT PROVISIONS.

U S West wrongly contends that the Ninth Circuit's decision upholding the challenged combinations and collocation provisions delegates "unbounded and unreviewable" authority to the WUTC to create "federal obligations." Pet. at 20-24. In U S West's view, state commissions may only impose interconnection requirements that are expressly mandated by the Act or FCC regulations, and lack any authority to interpret or implement the Act's requirements in the absence of explicit federal guidelines. U S West similarly argues that the federal courts may only uphold interconnection provisions that are expressly required by the Act or FCC regulations, and must strike any additional obligations imposed by a state commission even if they do not violate "some specific statutory prohibition." *Id.* at 22.

U S West's arguments are unfounded and fundamentally mischaracterize the respective roles that Congress established for state commissions and the federal courts under the Act. As this Court noted in *IUB*, the Act is a valid exercise of Congress' constitutional authority under Article I, Section 8 of the Constitution (the "Commerce Clause") and preempts state regulation of local telecommunications to the extent

provided under the statutory scheme. *IUB*, 525 U.S at 381 n.8 ("Congress, by extending the [] Act into local competition, has removed a significant area from the States' exclusive control."). Although Congress could have exercised its constitutional power to preempt the states completely from the field of local telephone competition, Congress instead created a "decidedly novel" statutory scheme of shared federal and state authority. *Id.* at 385 n.10. Congress vested the FCC with primary responsibility for promulgating regulations to implement the substantive provisions of the Act. *Id.* at 384-85. The Act then grants to state commissions, on a voluntary basis, authority to arbitrate disputes among incumbent LECs and CLECs over the Act's requirements and to approve or reject interconnection agreements. 47 U.S.C. §§ 252(b), (c), (e). Where a state commission chooses to assume this regulatory authority, it must follow the dictates of the Act and the FCC's implementing regulations. *IUB*, 525 U.S. at 378 n.6. The state commission may also impose additional requirements under state law, provided they are not inconsistent with the Act or FCC regulations. *See, e.g.*, 47 U.S.C. §§ 252(e)(3), (f)(2).[10] The FCC purposefully adopted "*minimum* requirements" in the Local Competition Order with the expectation that state commissions would "impose additional pro-competitive requirements that are consistent with the Act and our rules." Local Competition Order, 11 F.C.C.R. at 15534 (¶ 66) (emphasis added). Finally,

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[10] The Act contains several provisions that expressly preserve or grant states and state commissions the authority to impose and enforce state law requirements and obligations beyond those set forth in the Act and the FCC regulations. For example, Section 251(d)(3) prohibits the FCC from issuing regulations that preclude enforcement of "any regulation, order, or policy of a State commission"; Section 254(f) permits states to adopt universal service regulations; and Sections 261(b) and (c) permit states to enforce existing and promulgate additional regulations.

Congress vested the federal courts with jurisdiction to review state commission determinations in interconnection proceedings to ensure that the statutory requirements are satisfied and that any additional obligations imposed by the state commissions do not violate the Act. 47 U.S.C. § 252(e)(6).

The statutory scheme disproves U S West's contention that "[s]tate regulators . . . may impose *only* those conditions that are required by federal standards." Pet. at 20 (emphasis added). State commissions have "plenary authority" under the Act to impose terms and conditions in interconnection agreements based not only on the statutory provisions and FCC regulations, but also compatible state law. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n of Tex.*, 208 F.3d 475, 479-81 (5th Cir. 2000) ("*Southwestern Bell*"). This Court described the statutory scheme in similar terms, noting that it is a means by which "Congress has broadly extended its law into the field of intrastate telecommunications, [while leaving] the policy implications of that extension to be determined by state commissions." *IUB*, 525 U.S. at 385 n.10. The state commission's authority under the Act—while "plenary"—is not "unbounded and unreviewable," as U S West wrongly contends. Federal court review under Section 252(e)(6) ensures that if "a state commission is not regulating in accordance with federal policy [the federal courts] may bring it to heel." *Id.* at 378 n.6.[11] Although the Act is silent as to the applicable standard

[11] Congress provided additional checks to ensure ultimate federal review over state commission determinations by prohibiting state court review of state commission actions in approving or rejecting interconnection agreements, and by requiring the FCC to preempt the state commission's jurisdiction in any proceeding in which the state commission "fails to act to carry out its responsibility" under Section 252. 47 U.S.C. §§ 252(e)(4)-(5).

of review under Section 252(e)(6), virtually all federal courts, including the Ninth Circuit in this case, have reviewed state commissions' interpretations of the Act and the FCC's regulations *de novo*, according no deference to the state agencies' interpretations of federal law.[12] *AT&T Communications of Va., Inc. v. Bell Atl.-Va., Inc.*, 197 F.3d 663, 668 (4th Cir. 1999); *Bell Atl.-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 227 (D. Del. 2000); *AT&T Communications of the S. States, Inc. v. BellSouth Telecomms., Inc.*, 7 F. Supp. 2d 661, 668 (E.D.N.C. 1998); *U S W. Communications, Inc. v. Hix*, 986 F. Supp. 13, 19 (D. Colo. 1997).

The shared state-federal scheme established under the Act, while novel, has been critically important in implementing Congress' goal of rapid competition in local telephone markets. As this Court observed, the Act's interconnection requirements are not a "model of clarity." *IUB*, 525 U.S. at 397. State commissions have had to interpret and apply these requirements in hundreds of individual arbitrations involving a wide range of different carriers and varying local market conditions. Numerous issues have arisen that are not expressly addressed in the Act or the FCC's regulations, and some of the FCC's regulations have been vacated in the midst of these proceedings. This has required state commissions to resolve countless disputes based on their own interpretations of the Act's pro-competitive requirements, without any

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[12] Because state commissions are not "agencies" as defined by the Administrative Procedure Act, the standards provided by that act are not directly applicable. *See* 5 U.S.C. § 701(b)(1) (defining agency as an "authority of the Government of the United States"). Absent a statutory command, general standards for judicial review of agency action apply. "A state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*." *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998) (citation omitted).

controlling guidance from the FCC. *See, e.g., U S W. Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1121-22 (D. Colo. 1999) (upholding liquidated damages provisions to prevent anti-competitive conduct); *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc.*, No. A 97-CA-132 SS, 1998 U.S. Dist. LEXIS 15637, at *21-*24 (W.D. Tex. Aug. 31, 1998) (ordering unbundling of dark fiber and subloops before the FCC issued revised Rule 319 requiring these elements). The history of this case, as the Ninth Circuit recounted, was "punctuated" by "the subsequent history of the Eighth Circuit litigation" in *IUB*, and illustrates the type of changing legal landscape that state commissions have faced. *See* App. at 6a. Yet, under U S West's restrictive view of the Act, state commissions would be paralyzed from acting in such situations in the absence of a governing FCC regulation. This approach would be manifestly unworkable and would thwart the efforts of state commissions to open local markets to competition. Although U S West's interests may be served by such a result, it is not supported by the statutory scheme. Congress instead provided for federal court review of the state commissions' determinations to ensure that the Act's pro-competitive goals are properly implemented.

In this case, the Ninth Circuit properly discharged its judicial review function under the Act. The Ninth Circuit reviewed *de novo* the challenged combinations and collocation provisions ordered by the WUTC and determined that they did not violate the requirements of the Act. The Ninth Circuit based its determinations on the Act -- and, in the case of combinations, this Court's interpretation of the Act in *IUB*. The Ninth Circuit did not delegate "unbounded" authority to the WUTC; to the contrary, in reviewing the challenged collocation provisions, the Ninth Circuit expressly excluded the WUTC's decision-making process from its analysis. Had the Ninth Circuit determined that the challenged agreement provisions violated the Act, the Ninth

Circuit would have stricken them and remanded the issues for further proceedings consistent with the Act's requirements. *Cf. id.* at 11a-12a (remanding shared transport issue to ensure that the relevant agreement provisions complied with the Act and revised Rule 319). Although U S West disagrees with the Ninth Circuit's conclusions, the decision represents a conventional exercise of Section 252(e)(6) review authority and in no way expands the WUTC's regulatory powers under the Act, when properly construed.[13] The Petition thus presents no issue worthy of this Court's attention.

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[13] At least two other circuit courts of appeals have held that the proper standard of review is not whether the Act expressly requires the challenged provision, but whether the interconnection agreement violates the Act. *See Southwestern Bell*, 208 F.3d at 483-84 (state commission determination that reciprocal compensation obligations encompass ISP-bound traffic "does not conflict with the Act or with any FCC rule regarding such traffic"); *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 572 (7th Cir. 1999) ("our task is to examine the [state commission] order . . . to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation"). These decisions, like the Ninth Circuit's, properly construe the nature and scope of the state commission's regulatory authority under the Act and further demonstrate that U S West's "unbounded delegation of federal authority" argument has no merit.

CONCLUSION

For the foregoing reasons, U S West's Petition for a Writ of *Certiorari* should be denied.

Respectfully Submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

QWEST CORPORATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

SPRINT COMMUNICATIONS CO. L.P., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Qwest Corporation[1] asks this Court to grant its Petition for a Writ of Certiorari to review decisions of the Ninth Circuit Court of Appeals, in which that court affirmed decisions of the Washington Utilities and Transportation Commission ("WUTC") regarding US West's obligation to open its local telecommunications network to new competitors under the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* ("1996 Act"). *See MCI Telecommunications Corp. v. US West Communications, Inc.*, 204 F.3d 1262 (9th Cir. 2000). US West argues that there are conflicts between the Ninth Circuit and two circuit courts of appeals exercising Hobbs Act[2] review of orders by the Federal Communications Commission ("FCC"). US West also argues that the Ninth Circuit misinterpreted and misapplied the provision in the 1996 Act that authorizes federal court review of state commission determinations, 47 U.S.C. § 252(e)(6).

This case is not about the Hobbs Act or the supremacy of federal law. Rather, this case involves the WUTC's straightforward implementation of the pro-competitive policies of the 1996 Act.[3] The WUTC is

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[1]US West Communications, Inc., has been renamed Qwest Corporation as a result of a merger. Like the petitioner, the Commission will use the name "US West" to be consistent with the name used below.

[2]28 U.S.C. §§ 2341 *et seq.*

[3]The 1996 Act is designed to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ." H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

charged by the 1996 Act to effect the obligations of incumbent companies, such as US West, to interconnect their facilities with those of competitors in the local market. There is neither conflict among the circuit courts of appeals nor inconsistency between the decisions of the Ninth Circuit and this Court. The Court should deny the Petition.

STATEMENT

A. The Requirement for Interconnection Between Telecommunications Companies Under the 1996 Act

This case arose out of the procedure under the 1996 Act by which incumbent local exchange telecommunications companies ("incumbent companies"), such as US West, are required to enter into "interconnection agreements" with their competitors. Through these agreements, competitors may acquire access to elements of the incumbents' telecommunications networks so they can compete with the incumbents in the local telephone market. 47 U.S.C. § 251(c)(3). This case involves three such agreements entered into between US West and competitors MCI Telecommunications Corporation ("MCI"), AT&T Communications of the Pacific Northwest, Inc. ("AT&T"), and Sprint Communications Company, L.P. ("Sprint"), respectively.

Interconnection agreements must contain the particular terms and conditions necessary for the incumbents to fulfill their statutory duties. *Id.* § 251(c)(1). Congress assigned to state public utility commissions, like the WUTC, the primary role in implementing the interconnection agreements. For example, although the incumbent company and the competitors are required to negotiate interconnection agreements in good faith, *id.*, if the parties are unable to resolve all issues through negotiation, a party to the

negotiation may request the state commission to arbitrate the open issues. *Id.* § 252(b)(1).[4]

In addition to their role as arbitrators under the 1996 Act, state commissions must approve all interconnection agreements regardless of whether the agreements are reached through negotiation or arbitration. *Id.* § 252(e)(1). However, the statutory criteria the state commission must apply in its review of an agreement differ depending on whether the agreement, or portion of the agreement, was reached by negotiation or arbitration. If an agreement was negotiated, a state commission may reject it, "or any portion thereof," only if the agreement or provision discriminates against a carrier not a party to the agreement or if the agreement or provision is not consistent with the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A). On the other hand, if the agreement or provision was arbitrated, the state commission has somewhat wider latitude. In that situation, the state commission may reject the agreement or provision only if "it finds that the agreement does not meet the requirements of section 251 [of the 1996 Act], including the regulations prescribed by the Commission [FCC] pursuant to section 251, or the standards set forth in subsection (d) of this section." *Id.* § 252(e)(2)(B). The 1996 Act also preserved the authority of a state commission to establish or enforce "other requirements of State law in its review of an agreement . . . ." *Id.* § 252(e)(3).[5]

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[4]The WUTC is authorized by the Washington state legislature to take actions, conduct proceedings, and enter orders as permitted or contemplated for state commissions under the 1996 Act. Wash. Rev. Code § 80.36.610(1).

[5]In 1985, the Washington state legislature passed the Regulatory Flexibility Act, Washington Laws of 1985, ch. 450, p. 1976, codified at several places in Title 80 Wash. Rev. Code, which authorized easy registration of telecommunications companies seeking to operate in Washington, and declared the state policy to promote diversity of supply

The 1996 Act specifically preempted state court review of a state commission action, *id.* § 252(e)(4), and assigned the task of judicial of review of state commission decisions to the United States District Court. *Id.* § 252(e)(6) ("[A]ny party aggrieved by such [state commission] determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.").

This case is the result of a challenge by US West to the WUTC's approval of the interconnection agreements between US West and MCI, A&T, and Sprint, and the subsequent review of that approval in the federal courts. While US West's initial challenges to the agreements were broad-based, the issues presented to this Court involve the relationship and status of certain FCC rules to the agreements and the lower court decisions affirming the WUTC.

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for telecommunications services. *See* Wash. Rev. Code §§ 80.36.300(5); .350.

In 1994, the Washington Supreme Court removed a historical barrier to local telephone competition by rejecting arguments that exclusive franchise service areas in the telecommunications industry were the law in Washington. *Electric Lightwave, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 530, 869 P.2d 1045 (1994). The court recognized that granting monopolies would run counter to the state policy promoting competition. *Id.* at 538-39 (citing Wash. Rev. Code § 80.36.300(5)).

Foreshadowing the 1996 Act, in order to foster emerging local competition, the WUTC entered an order setting forth the terms and conditions under which competitors for local exchange service will interconnect their networks with incumbents. *WUTC v. US West Communications, Inc., et al.*, Consolidated Docket Nos. UT-941464, -941465, -950146, -950265, 1995 WL 735315 (WUTC Oct. 31, 1995) (petition for judicial review stayed, King County Superior Court, No. 96-2-08435-2SEA). In that order, the WUTC determined that the transition to competitive markets would be accomplished largely through access to unbundled network elements and resale of services. *Id.* at *40-41. Therefore, the WUTC exercises its role to effect the pro-competitive policies, both under the 1996 Act and under pre-existing state law.

B. The FCC's Local Competition Rules and the *Iowa Utilities Board* Litigation Before the Eighth Circuit and This Court

In approving an arbitrated agreement or provision, the state commission must determine if it conforms with FCC rules. 47 U.S.C. § 252(e)(2)(B).[6] Following the passage of the 1996 Act, the FCC promulgated regulations to implement the local competition provisions of the Act, including those relating to interconnection and access to unbundled network elements. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("Local Competition Order"). These regulations specified which telecommunications "network elements" an incumbent must make available to its competitors. A network element is a facility or equipment used in the provision of a telecommunications service. 47 U.S.C. § 153(29). For example, a "switch" routes the call and is connected to the local "loop," which runs from a customer's place of use to the switch.[7]

In these rules, the FCC imposed at least three separate provisioning requirements for unbundled network elements. First, it required incumbents to provide unbundled network elements in a manner that would allow competitors to

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[6]However, with regard to agreements, or portions of agreements, that are adopted by negotiation, the state commission need not apply the FCC rules. Rather, in such cases, the state commission may reject the agreement, or portion thereof, only if it determines that it is not consistent with the public interest or discriminates against a carrier not a party to the agreement. 47 U.S.C. § 252(e)(2)(A).

[7]Simply speaking, a "switch" is "a mechanical, electrical or electronic device which opens or closes circuits, completes or breaks an electrical path, or selects paths or circuits." NEWTON'S TELECOM DICTIONARY, 757 (15th ed. 1999). The "local loop" is the physical connection from the customer's premises to the local exchange company's central office. *Id.* at 465.

combine the elements in order to provide a finished service, 47 C.F.R. § 51.315(a) ("finished service rule"). Second, it prohibited incumbents from separating already-combined network elements, unless otherwise requested by competitors. *Id.* § 51.315(b) ("no separation rule"). Finally, the FCC required incumbents to combine network elements at the request of competitors. *Id.* § 51.315(c)-(f) ("mandatory combination rule"). The mandatory combination rule is a focal point of US West's Petition.

Numerous parties, including US West, petitioned for judicial review of the Local Competition Order. These cases were consolidated in the Eighth Circuit Court of Appeals. The Eighth Circuit temporarily stayed the entire body of the FCC's rules, *Iowa Utils. Bd. v. Federal Communications Comm'n*, 109 F.3d 418, 421 (8th Cir. 1996), and ultimately, the Eighth Circuit stayed only selected rules but left the finished service, no separation, and mandatory combination rules intact. *Id.* at 427 & n.8.[8]

In its review of the FCC's rules, the Eighth Circuit vacated the mandatory combination rule, 47 C.F.R. § 51.315(c)-(f). *Iowa Utils. Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). On rehearing, the Eighth Circuit also vacated Rule 315(b), the no separation rule. *Id.*

On January 25, 1999, this Court affirmed in part and reversed in part the Eighth Circuit's decision. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). With respect to the FCC's no separation rule, the Supreme Court reversed the Eighth Circuit's decision that Rule 315(b) violates the Act and reinstated that rule. *AT&T Corp.*, 525 U.S. at 393-95.

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[8]The Eighth Circuit stayed the FCC's rules establishing pricing guidelines for state commissions and the so-called "pick and choose" rules implementing 47 U.S.C. § 252(i). *Iowa Utils. Bd.*, 109 F.3d at 421.

The Court rejected the argument that the Act requires competitors to combine network elements for themselves. The Court remanded the case to the Eighth Circuit for "proceedings consistent with" the opinion. *Id.* at 397. This Court did not rule on the mandatory combination provision in *AT&T Corporation*.

On remand, the Eighth Circuit decided that the mandatory combination rule violates the Act and vacated Rules 315(c)-(f). *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758-59 (8th Cir. 2000) ("*Iowa Utils. Bd. II*"). Therefore, there is no FCC requirement that incumbent companies must combine network elements at the request of their competitors.

C. The FCC's Collocation Rules and Proceedings Before the D.C. Circuit

In addition to the requirements for interconnection and access to unbundled network elements, the 1996 Act requires incumbents to permit competitors to collocate "equipment necessary for interconnection or access to unbundled network elements" on the incumbents' premises. 47 U.S.C. § 251(c)(6).[9] In its rules implementing the collocation requirement, the FCC determined that

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[9]The 1996 Act provides for both physical and virtual collocation. 47 U.S.C. § 251(c)(6). "Physical collocation" is the physical placement of a competitor's facilities at the incumbent's premises. The competitor has access to these facilities. "Virtual collocation" occurs when the competitor's facilities are terminated at the incumbent's premises and connected to the incumbent's facilities. The incumbent maintains facilities that are virtually collocated. *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4771, ¶ 19 n.27 (1999), *aff'd in part and rev'd in part and remanded GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). The 1996 Act states a preference for physical collocation because it conditions virtual collocation on an incumbent's showing to the state commission that physical collocation is not practical for technical reasons or because of limited space. *See* 47 U.S.C. § 251(c)(6).

"necessary" equipment was equipment that is "used or useful" for interconnection or access to unbundled network elements. *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4776-77, ¶ 28 (1999) ("Collocation Order").

Incumbent companies petitioned for review of the Collocation Order in the United States Court of Appeals for the District of Columbia Circuit. *GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). In its review of the Collocation Order, the D.C. Circuit reversed the FCC's definition of "necessary" as "used and useful," holding it was overly broad for purposes of the collocation requirement set forth in the 47 U.S.C. § 251(c)(6). *Id.* at 422. The FCC's definition, the D.C. Circuit held, would require an incumbent to collocate almost any piece of equipment owned by a competitor. *Id.* at 424.

The D.C. Circuit relied in part on this Court's decision to vacate the FCC's definition of "necessary" for purposes of access to unbundled network elements. *Id.* at 423-24 (citing *AT&T Corp.*, 525 U.S. at 389-90). In *AT&T Corporation*, this Court determined that the FCC, by interpreting the word "necessary" in terms of any increase in cost or degradation of service quality, gave competitors essentially "blanket access" to the incumbents' networks, which was not what Congress had intended. *AT&T Corp.*, 525 U.S. at 389-90. Therefore, the Court vacated the FCC's unbundling rule, 47 C.F.R. § 51.319, and remanded the rule for a more limited definition of "necessary" to be applied when the FCC or state commissions decide which unbundled network elements an incumbent must provide under 47 U.S.C. § 251(c)(3). *Id.* at 390, 397; *see also* 47 U.S.C. § 251(d)(2).

D. Proceedings Below

1. Negotiations Between the Parties and Arbitration of Unresolved Issues Before the WUTC

MCI, AT&T, and Sprint each requested negotiations with US West for interconnection under the 1996 Act. In no case were the parties able to negotiate an entire agreement, therefore, each competitor requested that the WUTC arbitrate the unresolved issues pursuant to 47 U.S.C. § 252(b)(1).

To best fulfill its duty to arbitrate agreements under the 1996 Act, the WUTC adopted "final offer" arbitration, whereby the arbitrators resolved the disputed issues between US West and its competitors by selecting between the parties' last proposals as to each unresolved issue, selecting the proposal that was the most consistent with the requirements of the 1996 Act, state law, and WUTC policy. *See, e.g.*, Pet. App. 118a. Under this approach, the parties have the incentive to approach a middle ground. If neither party to an agreement submitted a final offer that complied with applicable law or policy, the arbitrator would resolve the disputed issue in a manner to assure such compliance. Only the disputed issues were before the arbitrators for decision. Negotiated issues were not subject to arbitration, but were subject to WUTC approval. 47 U.S.C. § 252(e)(1).

In each of the three agreements at issue, the WUTC required US West to combine network elements for the competitors.[10] At the conclusion of their respective

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[10] The interconnection agreement between US West and MCI provides that "US West shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit [MCI] to provide Telecommunications Services to its subscribers." Pet. App. 28a n.3. The agreement between US West and AT&T provides that "AT&T may purchase unbundled network Elements individually or in Combinations without restrictions as to how those elements may be rebundled" and that "AT&T may order and US West shall provision unbundled network elements either individually

arbitrations, the companies had the opportunity to restate any objections to the arbitrators' decisions in oral argument before the commissioners of the WUTC. *See, e.g.*, Pet. App. 99a. The WUTC approved the agreements, but modified the MCI and AT&T agreements to include a provision requiring US West to allow MCI and AT&T to collocate remote switching units[11] on US West's premises. *Id.* at 89a-90a; 94a-95a.

2. Federal Court Review of the WUTC's Arbitration Decisions

Pursuant to 47 U.S.C. § 252 (e)(6), US West challenged the WUTC's decision approving the interconnection agreement in the district court, and disputed a whole host of provisions in the agreement. *See* Pet. App. 24a-86a. After the WUTC had issued its decisions approving the agreements, but before the district court issued its orders, the Eighth Circuit vacated the FCC's mandatory combination

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or in combination on a single order. Network Elements ordered as combined shall be provisioned as combined." *Id.* at 59a n.3. Finally, the US West/Sprint agreement contains the following provision:

> "US West agrees to perform and Sprint agrees to pay for the TELRIC costs of the functions necessary to combine requested elements in any technically feasible manner either with other elements from US West's network, or with elements possessed or arranged for by Sprint. However, US West need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined." *Id.* at 81a-82a n.3.

[11] A remote switching unit, or module, is a small end office switch that depends on a larger host switch for most of its features and functions. The remote switching unit usually is located in another building from the host switch.

rule and the no separation rule. *See Iowa Utils. Bd.*, 120 F.3d at 813; *see also* 47 C.F.R. § 51.315(b)-(f). Relying on the Eighth Circuit's decision, the district court overturned the WUTC's decisions approving the language in the agreements that required US West to combine network elements. *See* Pet. App. 27a-29a; 58a-60a; 81a-83a.

The district court affirmed the WUTC's decisions requiring US West to allow collocation of remote switching units. The court held that the WUTC's decision to require such collocation was not arbitrary and capricious because without it the MCI and AT&T would be at a technical and economic disadvantage. *See* Pet. App. 33a-34a; 65a-66a.

All parties appealed the district court's decisions to the Ninth Circuit. US West appealed, among other issues, the district court's decisions regarding the collocation of remote switching units. The WUTC and the competitors appealed the district court's decisions regarding the combination of network elements. While these cases were pending before that court, this Court issued its opinion in *AT&T Corporation*. In that decision, this Court overturned the Eighth Circuit's invalidation of 47 C.F.R. § 51.315(b). *AT&T Corp.*, 525 U.S. at 393-95. The Court also vacated the FCC's definition of "necessary" as that term is used in 47 U.S.C. § 251(d)(2). 525 U.S. at 387-92.

REASONS FOR DENYING THE PETITION

I. The Court Should Not Grant the Petition Regarding the Ninth Circuit's Decision Affirming the Combination Requirements in the Agreements.

US West urges this Court to grant its Petition with respect to the requirement that US West combine network elements at the competitors' request. US West alleges that the Ninth Circuit improperly invaded the jurisdiction of the Eighth Circuit to review the FCC's network element rules, thereby circumventing the policy behind the Hobbs Act, 28 U.S.C. §§ 2341 *et seq.* Pet. at 11-12. US West also

alleges there is a conflict between the circuits regarding the obligations of incumbents to combine network elements at the request of competitors. *Id.* at 11-12. US West asks this Court to grant its Petition even though the Court recently denied US West's Petition for Certiorari to review a similar decision of the Ninth Circuit on nearly identical grounds. *US West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied* 120 S. Ct. 2741 (2000), *pet. for reh'g denied* 69 U.S.L.W. 3156 (U.S. Aug. 28, 2000) (No. 99-1641).

A. There Is No Conflict Among Circuit Courts of Appeal Because the Ninth Circuit's Decision Affirming the Combination Requirements Does Not Implicate the Hobbs Act.

Here, as in the *MFS Intelenet* case, the Hobbs Act is not implicated at all. Contrary to the argument of US West, the Ninth Circuit did not engage in judicial review of the FCC's mandatory combination rules set forth at 47 C.F.R. § 51.315(c)-(f). Under the Hobbs Act, only the Eighth Circuit has jurisdiction "to enjoin, set aside, suspend . . . or to determine the validity of" that rule. 28 U.S.C. § 2342. Consistent with the Hobbs Act, the Ninth Circuit did none of those. In fact, the Ninth Circuit's decision is premised on the fact that Rules 315(c)-(f) are invalid. *MCI Telecommunications Corp.*, 204 F.3d at 1268; Pet. App. 9a. The Eighth Circuit's invalidation of Rules 315(c)-(f) simply left no rule in place requiring incumbent carriers to combine elements. *Id.* Because there was no affirmative FCC requirement that incumbents must combine elements for competitors, the question before the Ninth Circuit became: Did the 1996 Act, in the absence of such rule, prohibit state commissions from requiring an incumbent to combine network elements at the request of its competitors? The Ninth Circuit held that it did not. *Id.* Because the FCC's combination rules were not before the Ninth Circuit for either

interpretation or enforcement, that court did not usurp the Eighth Circuit's authority to review the rules. Rather, the Ninth Circuit interpreted the 1996 Act, as guided by this Court's decision in *AT&T Corporation*, and determined that the combination provisions do not violate the Act. The Eighth Circuit's recent reaffirmation of its prior decision to vacate Rules 315(c)-(f) does not affect the *status quo*.

US West's argument boils down to nothing more than its erroneous assertion that the Eighth Circuit, by virtue of its review of the FCC rules, is the only court with jurisdiction to interpret the 1996 Act. This argument is wrong for two reasons.

First, the Ninth Circuit's decision represents exactly what Congress intended when it provided for federal court review over state commission arbitration decisions. *See* 47 U.S.C. § 252(e)(6). Congress did not structure the 1996 Act to provide for review of state commission decisions in a single federal district court. Rather, Congress permitted parties aggrieved by state commission determinations to bring an action in the "appropriate" federal district court. *Id.* Therefore, Congress contemplated that several district courts would review interconnection agreements to determine whether the agreements meet the requirements of Sections 251 and 252 of the Act. *Id.*

Second, while uniformity of federal law is an important consideration, federal district courts are not bound by the decisions issued by other district courts. *See, e.g., Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (district court is not bound by another district court's decision, or even an opinion by another judge of the same district); *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir. 1987) ("[N]either this court nor the district courts of this circuit give the decisions of other courts of appeals automatic deference; we recognize that, within reason, the parties to cases before us are entitled to our independent judgment."). Congress was well aware that district courts are

not bound by the decisions of other district courts when it provided for review of state commission decisions in the several federal district courts.

It is undisputed that one of the policies behind the Hobbs Act is to ensure that judicial review of federal agency action is conducted by a single circuit court, rather than by many district courts. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906-07 (1984), *vacated on other grounds* 476 U.S. 1167 (1986). However, this policy of uniform judicial review of federal *rules* does not mean that federal courts must blindly adhere to a sister court's interpretation of federal *statutes*. The Hobbs Act does not require the Ninth Circuit to defer automatically to the Eighth Circuit's interpretation of the 1996 Act. US West's argument that the Hobbs Act empowers the Eighth Circuit with exclusive authority to interpret the 1996 Act is wrong, and does not warrant review by this Court.

B. There Is No Conflict Among Circuit Courts of Appeals In Their Interpretations of the 1996 Act As It Relates to Interconnection Agreement Provisions That Require an Incumbent to Combine Network Elements.

US West also argues that there is a conflict between the decision of the Ninth Circuit and the Eighth Circuit regarding an incumbent's obligation to combine unbundled network elements. Pet. at 11-14. However, no such conflict exists. The Eighth Circuit, in reviewing the FCC's rules, held that the 1996 Act does not require an incumbent to combine elements at the request of a competitor. *Iowa Utils. Bd. II,* 219 F.3d at 759 (citing *Iowa Utils. Bd.*, 120 F.3d at 813). The Ninth Circuit did not say that the 1996 Act requires an incumbent to combine network elements. Rather, the Ninth Circuit, in its review of interconnection agreements, held that the 1996 Act does not prohibit a requirement that incumbents combine network elements at

the request of competitors. *MCI Telecommunications Corp.*, 204 F.3d at 1268; Pet. App. 9a.

The United States Court of Appeals for the Fifth Circuit also has held that the 1996 Act does not prohibit the inclusion in an interconnection agreement of a provision requiring an incumbent to combine elements. *Southwestern Bell Tel. Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 821 (5th Cir. 2000). Following the Eighth Circuit's decision in *Iowa Utilities Board II*, the Fifth Circuit rejected Southwestern Bell's argument that the Eighth Circuit's decision made such a requirement "illegal" or "unlawful." *Southwestern Bell*, 221 F.3d at 820-21. The Fifth Circuit held:

> "[T]here is nothing 'illegal' about the provision requiring [Southwestern Bell] to combine network elements for [competitive providers]. Nothing in the Telecommunications Act forbids such combinations. Even if the Eighth Circuit's decision on this issue is correct - - which we do not decide today - - it does not hold that such arrangements are prohibited; it only holds that they are not required by law." *Southwestern Bell*, 221 F.3d at 821.

Thus, there is no conflict among the circuits regarding whether a provision in an interconnection agreement requiring US West to combine network elements at the request of a competitive provider is prohibited by the 1996 Act. The Court should deny US West's Petition.

C. In Any Event, State Law Permits the WUTC to Impose a Requirement that US West Combine Network Elements At the Request of the Competitors.

The combination provisions also may be affirmed on the ground that the provisions may be imposed as a matter of

state law. The 1996 Act contemplates that state commissions may impose requirements that are a function of state law in their review and approval of interconnection agreements. *See* 47 U.S.C. §§ 251(d)(3); 252(e)(3). A state commission's decision to order an incumbent to combine network elements for a competitor would not be preempted by the 1996 Act because such a decision would not conflict with the pro-competitive policies of the Act or any if its provisions. *See English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). In addition, by granting states the authority to apply and enforce state law in their approval of agreements, Congress clearly did not preempt the field of local telecommunications regulation. *Id.* at 79.

The WUTC has imposed a combination requirement on incumbent companies as a matter of state law in arbitrating an interconnection agreement in other cases, as well.[12] The fact that state commissions may impose such a requirement under state law is a basis for this Court to deny the Petition.

II. The Court Should Deny the Petition As to the Ninth Circuit's Decision to Affirm the Provisions in the Agreements That Permit the Competitors to Collocate Remote Switching Units on US West's Premises.

US West asks this Court to grant its Petition as to the requirement that it permit competitors MCI and AT&T to collocate remote switching units on its premises. US West argues that the Ninth Circuit, by affirming this requirement, circumvented the Hobbs Act authority of the D.C. Circuit, created conflict among the circuit courts of appeals, and

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[12] *See, e.g., In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Incorporated Pursuant to 47 U.S.C. Section 252*, Docket No. UT-960307, 1998 WL 223213 (WUTC March 16, 1998).

ignored this Court's construction of the 1996 Act. However, the Ninth Circuit's decision to affirm the provisions is consistent with the decisions of this Court and the purpose of the 1996 Act.

A. There Is No Conflict Among Circuit Courts of Appeals Because the Ninth Circuit's Decision Affirming the Collocation of Remote Switching Units Does Not Implicate the Hobbs Act.

US West argues that the Ninth Circuit erred by applying the FCC's definition of "necessary" -- a definition that was vacated by the D.C. Circuit -- when it affirmed the collocation provisions in the agreements. Pet. at 17; *see also GTE Serv. Corp.* 205 F.3d at 422-424. This argument fails for reasons similar to those set forth above concerning US West's claims regarding combination provisions.

As argued above, the Ninth Circuit is not bound by the D.C. Circuit's interpretation of the Act. Nor must the Ninth Circuit defer to the D.C. Circuit because that court was reviewing the FCC's collocation rules pursuant to the Hobbs Act. As was the case when the Eighth Circuit vacated the FCC's mandatory combination rules, the D.C. Circuit's decision to vacate the FCC's definition of "necessary" simply leaves no FCC definition of what equipment competitors may collocate on incumbents' premises.

In the absence of a binding FCC decision regarding collocation, the Ninth Circuit properly reviewed the collocation provisions of the arbitrated agreements to determine whether they "meet the requirements of" the 1996 Act. *See MCI Telecommunications Corp.*, 204 F.3d at 1268 (quoting 47 U.S.C. § 252(e)(6)); Pet. App. 11a. The Ninth Circuit considered the collocation provisions and determined that such provisions do not violate the 1996 Act. *Id.*

B. The Ninth Circuit's Decision Regarding the Collocation of Remote Switching Units Does Not Conflict With the Decisions of This Court or Other Circuit Courts of Appeals.

Contrary to the arguments of US West, the Ninth Circuit's decision to affirm the provisions in the agreements that permit MCI and AT&T to collocate remote switching units on US West's premises does not ignore this Court's decision in *AT&T Corporation* vacating the FCC's interpretation of "necessary" as that word is used in 47 U.S.C. 251(c)(3). In that decision, this Court held that the FCC failed to interpret the word "necessary" in a way that would impose some limitations on the unbundled network elements incumbents must provide to competitors. *AT&T Corp.*, 525 U.S. at 388-92. The Court further held that Congress did not intend to require incumbents to provide competitors with "blanket access" to their networks. *Id.* at 390. Therefore, the Court vacated the FCC's specific unbundling requirements. *Id.* at 392. *See also* 47 C.F.R. § 51.319.

The collocation provisions affirmed by the Ninth Circuit do not provide competitors with *carte blanche* to collocate any equipment on US West's premises that they believe will be useful to them. Rather, the agreement provisions ordered by the WUTC allow the competitors to collocate discrete pieces of equipment for the limited purpose of effecting interconnection and access to unbundled network elements. *See discussion infra* pp. 19-20. Therefore, the Ninth Circuit's decision does not result in an overly broad definition of the word "necessary." The concerns about unbridled access to the incumbents' networks that prompted this Court and the D.C. Circuit to vacate the FCC's rules simply are not present in the collocation provision approved by the Ninth Circuit.

The Act requires incumbents, like US West, to provide for physical collocation of competitors' equipment that is necessary for interconnection or access to unbundled network elements at the incumbents' premises. 47 U.S.C. § 251(c)(6). The WUTC ordered US West to permit both MCI and AT&T to collocate remote switching units on its premises. Incumbents must provide interconnection[13] to their competitors that is "at least equal in quality" to the interconnection the incumbent provides to itself or its affiliates or subsidiaries. *Id.* at § 251(c)(2)(C). By requiring the collocation of remote switching units, the WUTC properly implemented the "equal quality" interconnection requirement of the 1996 Act.

US West incorrectly states that the WUTC allowed competitors to collocate remote switching units on its premises because such equipment is "used" for collocation or access to unbundled network elements. Pet. at 16-17. Although the "useful" standard was in effect when it issued its decisions, the WUTC's reasons for requiring such collocation extended beyond the "used and useful" definition.

At the conclusion of the arbitration proceedings, the WUTC decided that US West must permit MCI and AT&T to collocate remote switching units on US West's premises. The WUTC based its decision on the recommendation of its staff that failure to allow for such collocation would result in inferior quality interconnection for the competitors. *See* App. at 1a-5a.

In order to provide local service to their subscribers, competitive local companies must interconnect their networks with the incumbents' networks. Because of their ubiquitous networks, much of this interconnection must be

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[13]"Interconnection" is the physical linking of two networks for the mutual exchange of traffic. *Local Competition Order*, 11 FCC Rcd at 15590, ¶ 176.

done on the incumbents' premises. If a competitor cannot place remote switching units in the incumbent's central office, then the competitor must extend its loops to its own central office. One option is to add copper cable between the incumbent's and competitor's central offices, but this would degrade the service quality. The other option would be to use back-to-back electronic arrangements. However, this also would degrade the quality of service to the customer. *See id.* at 4a, 8a. The WUTC's decision to require collocation of remote switching units assures that MCI and AT&T will receive interconnection that is at least equal in quality to the interconnection US West provides to itself. This reasoning is consistent with the requirements of 47 U.S.C. §§ 251(c)(2) and (c)(6), as well as the pro-competitive policy of the 1996 Act. App. at 3a-4a.

The WUTC's orders do not permit the competitors to collocate remote switching units in order to perform functions that are not necessary to achieve equal quality interconnection or access to unbundled network elements. *See, e.g.*, Pet. App. 94a-95a. The WUTC also expressly stated that the competitors would not be allowed to use the remote switching units to avoid paying carrier access charges to US West. *Id.* In fact, during a hearing before the WUTC commissioners in the AT&T proceeding, counsel for US West said the company would concur in the WUTC staff's recommendation to require collocation of remote switching units so long as AT&T would not use the equipment to avoid paying access charges. App. at 10a. By limiting the collocation of remote switching units to functions necessary for interconnection or access to unbundled network elements, the WUTC correctly implemented the requirements of 47 U.S.C. §§ 251(c)(2) and (c)(6).

When a state commission includes a collocation provision in an interconnection agreement that permits competitors to obtain "equal quality" interconnection, that

provision "meets the requirements of" 47 U.S.C. § 251(c)(6). *See* 47 U.S.C. § 252(e)(6). Therefore, the Ninth Circuit properly decided that the 1996 Act does not prohibit such a provision, and this Court should decline to review that decision.

III. The Ninth Circuit Did Not Expand the Role of State Commissions Under the 1996 Act, Nor Did It Disable Federal Court Review of Agreements Or Threaten The Primacy of Federal Law.

In its petition, US West argues that the Ninth Circuit, by affirming provisions of interconnection agreements beeause they do not violate the 1996 Act, has surrendered federal court review over state commission determinations, and has otherwise upset the primacy of federal law. Pet. at 20-21. This argument has no merit.

A. The WUTC Lawfully Exercised Its Broad Responsibilities Under the 1996 Act and The Ninth Circuit Properly Reviewed and Affirmed the WUTC's Decisions.

Contrary to US West's arguments, Congress created a considerable role for state commissions in implementing the local competition provisions of the 1996 Act. For example, state commissions are authorized to arbitrate open issues that parties to an interconnection agreement cannot successfully negotiate. 47 U.S.C. § 252(b). With respect to these disputed issues, state commissions must set the particular terms, conditions, and prices in a way that meets the requirements of the 1996 Act. *Id.* §§ 252(c) and (d). All interconnection agreements, whether they are reached through arbitration, negotiation, or both, must be approved by the state commission. *Id.* § 252(e)(1).

In addition, the 1996 Act contemplates that state commissions may impose requirements that are a function of state law in their review and approval of interconnection agreements. *See* 47 U.S.C. § 251(d)(3) (state commissions

may enforce state policies that establish access and interconnection obligations of telecommunications companies that are consistent with the requirements of Section 251 and do not substantially prevent the implementation of Section 251 and the purposes of the Act); 47 U.S.C. § 252(e)(3) (state commissions may establish or enforce state law requirements when reviewing interconnection agreements). In passing the 1996 Act, Congress did not assign to state commissions the token role US West urges this Court to adopt. Rather, Congress established a scheme under which state commissions would have the primary role in implementing the interconnection agreements in which the incumbents' specific obligations are embodied.

The 1996 Act requires US West to make unbundled network elements available to competitors and also requires US West to allow competitors to collocate on its premises equipment necessary for interconnection or access to unbundled network elements. 47 U.S.C. §§ 251(c)(3); (6). Currently, there are no binding FCC rules requiring incumbents to combine network elements or to allow collocation of remote switching units. Therefore, US West argues that the WUTC, by imposing these requirements in the agreements, has created "new regulatory obligations out of whole cloth," and faults the Ninth Circuit for what it calls a "hands off approach" in reviewing the agreement. Pet. at 22-23. This argument is not supported by the record or the Ninth Circuit's decision and should be rejected.

The combination provisions in the agreements are consistent with the 1996 Act and with this Court's decision in *AT&T Corporation*. At the time the WUTC imposed the combination provision, incumbents were required by the FCC to combine elements, *see* 47 C.F.R. § 51.315(c)-(f), but the Eighth Circuit ultimately vacated the FCC requirement. Therefore, the Ninth Circuit's task was to decide whether, in the absence of an FCC rule mandating combination, a

provision requiring US West to combine elements violates the Act. *MCI Telecommunications Corp.*, 204 F.3d at 1268; Pet. App. 9a. The Ninth Circuit decided that such provisions do not violate the Act based on this Court's interpretation of 47 U.S.C. § 251(c)(3) in *AT&T Corporation*. *Id.* *See AT&T Corp.*, 525 U.S. at 394. The Ninth Circuit's decision to affirm the combination provisions in the interconnection agreements hardly results in the creation of a federal obligation "out of whole cloth."

Likewise, US West's argument that the WUTC disregarded federal law by requiring US West to collocate remote switching units fails. The WUTC imposed the requirement in order to facilitate equal quality interconnection for MCI and AT&T. The fact that the D.C. Circuit vacated the FCC's definition of "necessary" does not change the nature of the WUTC's collocation requirement. The WUTC's decision that collocation of remote switching units is necessary for equal quality interconnection is based on 47 U.S.C. § 251(c)(6) as well as on the pro-competitive policy of the Act.

In providing for federal court review of state commission determinations, Congress sought to ensure that arbitrated provisions in interconnection agreements comply with the 1996 Act. 47 U.S.C. § 252(e)(6). The very fact of US West's petition belies its claim that the Ninth Circuit has disabled federal court review over agreements. The Ninth Circuit reviewed the agreements and determined that they meet the requirements of the 1996 Act, which is exactly what Congress had envisioned.

In affirming the collocation provisions, the Ninth Circuit was cognizant of the implications of the FCC's overly broad definition of "necessary." *MCI Telecommunications Corp.*, 204 F.3d at 1269; Pet. App. 10a. However, the court also recognized that, unlike the D.C. Circuit, it was not reviewing a rule that could impose unfettered obligations on incumbents. *Id.* Rather, the Ninth Circuit reviewed the

decision of a state commission to impose a very limited collocation requirement on US West. Finding that the provision does not violate the Act, the Ninth Circuit correctly affirmed it. This Court should deny US West's Petition.

B. The Ninth Circuit Did Not Dismantle the Federal Courts' Jurisdiction to Review Interconnection Agreements Or Unravel the Primacy of Federal Law.

The Ninth Circuit's decisions to affirm the two requirements at issue do not upset the primacy and uniformity of federal law. US West complains that the decisions will result in obligations that "vary from state to state." Pet. at 24. However, the 1996 Act does not contemplate a single, national interconnection agreement to which all incumbents and competitors must adhere. Instead, the 1996 Act provides for the arbitration of issues by individual state commissions. 47 U.S.C. § 252(b). The 1996 Act further authorizes state commissions to impose state law obligations on parties to interconnection agreements. *Id.* at § 252(e)(3). Review of interconnection agreements will be undertaken by many federal district courts, which are not bound by the decisions of other federal courts. *See id.* § 252(e)(6). In addition, when an agreement (or provision) is reached entirely through negotiation, it need not meet the requirements of the 1996 Act at all. In short, the 1996 Act does not contemplate that interconnection agreements necessarily will be uniform.

The Ninth Circuit reviewed the interconnection agreements to determine whether they "meet the requirements" of the 1996 Act. This is exactly what the 1996 Act requires. In its review, the Ninth Circuit did nothing to upset the federal judiciary's authority to review interconnection agreements for consistency with federal laws. The Ninth Circuit did not negate the primacy of federal law. In sum, certiorari by this Court is unnecessary.

CONCLUSION

For the foregoing reasons, the WUTC requests that this Court deny US West's Petition for a Writ of Certiorari.

October 10, 2000

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APPENDIX A

[Open Meeting Memorandum prepared by WUTC Staff, March 5, 1997.]

Agenda: March 5, 1997

Item: 4A

Docket: **UT-930309**

Companies: AT&T Communications, Inc.
and US WEST Communications, Inc.

Staff: Jing Roth, Regulatory Consultant
Glenn Blackmon, Assistant Director - Telecommunications
Dave Griffith, Telecommunications Engineer
Larry Berg, Review Judge

Recommendation:

1. Grant in part and deny in part AT&T Communications, Inc.'s request for modification.

2. Deny US WEST Communications Inc.'s request for partial rejection and modification.

3. Reject the agreements as filed and order the parties to refile in compliance with staff's recommendations within 60 days.

Discussion

On March 1, 1996, AT&T Communications of the Pacific Northwest, Inc. ("AT&T") requested negotiations with US WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996 ("the Act" or "1996 Act"). On July 25, 1996, AT&T filed with the Commission and served on USWC a request for arbitration pursuant to the 47 USC § 252(b)(1). The Commission designated the petition as Docket No. UT-960309 and appointed Simon J. ffitch to arbitrate the disputed issues in this case. Hearings were held on October 21 and 22, 1996, evidence was considered, and on November 27, 1996, the arbitrator issued the *Arbitrator's Report and Decision* ("Report") relating to this docket. On February 4, 1997, the Arbitrator issued a supplemental Report clarifying the Report and Decision in regard to two issues: payphone resale and customer transfer charges. David Griffith, Glenn Blackmon and Jing Roth of the commission's telecommunications section staff participated in the arbitration hearings and advised the arbitrator in preparing the Report.

Under the terms of the Commission's *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements, under the Telecommunications Act of 1996* ("Interpretive Statement"), issued in Docket UT-960269, the companies submitted interconnection agreements on February 11, 1997. Agreements containing both arbitrated and negotiated provisions are subject to a 30 day deadline specified in the Act, which in this case is March 13, 1997. The Commission may either approve or reject the agreements, with written findings as to any deficiencies.

AT&T's Request for Modification

In its memorandum requesting approval, AT&T asks that the *Arbitrator's Report and Decision* be modified in two areas: (a) avoided cost discount rate, and (2) collocation of remote

switching units ("RSU"). It is worth noting that on December 6, 1996, AT&T also filed a petition for partial reconsideration of the same issues it has raised here. In the supplemental order, the arbitrator reconsidered two of the issues relating to payphone and customer transfer changes. Staff believes that the arbitrator has correctly decided these two issues in the supplemental order.

. . . .

Types of collocated equipment – switching

During the arbitration, AT&T requested the ability to place Remote Switching Units ("RSU") in collocated space. USWC stated that switching equipment is not required to be collocated because it does not meet the "necessary" requirement in the FCC's First Order and Report, CC 96-98, August 8, 1996 ("Order"). The arbitrator adopted USWC's position given that the record established that the RSU would primarily be used for switching function rather than interconnection.

Staff feels that arguments in favor of having RSUs collocated in an ILECs central office extend beyond just the legal interpretations of the FCC Order and the Act. First, the Act clearly intends to promote competition, and seeks to do so by encouraging collocation of carriers' facilities at "technically feasible" points, and in an efficient manner. In denying collocation of RSUs, the Commission requires that CLECs must accept some or all unbundled loop elements at the voice frequency level in one of the ILEC's central offices for transport to an CLEC's office for switching. The CLEC would be compelled to find an adequate switching equipment location near the C.O. This requirement puts the CLECs at a competitive disadvantage from both a cost and technical performance standpoint.

Technical standards are based on having a specific set of cable gauges (thickness of the copper) designed for each office, depending on the distance the customers are located from the central office. Thus loop lengths are specifically designed to conform to the requirements associated with the location of the central office and switch that they currently serve. An unbundled loop will remain within the service standards expected for local telephony as long as that loop terminates on a switch located in the same central office. Requiring CLECs to extend loops to another location will degrade service for that customer to some extent. Whether a customer notices this change will depend largely on what is needed to extend the loop to another location, be it more copper, additional loop electronics, etc., with the most significant factor being the length of the new loop. In addition, to the potential for noticeable service degradation, each extension will have an associated cost, therefore, making this service less competitive relative to the incumbent LEC.

The only desirable technical solution is to allow a CLEC the option to collocate a remote switching unit along with its other collocatable equipment in the ILECs central office. Allowance for collocation of RSUs in the incumbent's central offices will at least give CLECs the opportunity to avoid extending loops if it is not feasible for them to find a adequate switching equipment location in the same area as an incumbent's central office. Limiting the option to RSUs, means CLECs will have to maintain their large class 5 machines on their own premises. With the RSU alternative CLECs may substitute switching devices in ILEC's central offices in place of extra, possibly inefficient, electronics equipment needed for back to back arrangements. The use of RSUs should also reduce the need for extensive back hauling in the trunking network to reach the CLECs class 5 switch. To the extent possible, CLECs are encouraged to use RSU types that are capable of using direct trunking arrangements to nearby switch locations of the incumbents in order to lessen usage of the incumbent company's interoffice trunking network and local tandem switches for transporting calls.

Therefore, staff recommends that the arbitrator's decision be modified to allow collocation of AT&T's RSUs in USWC's end offices. As part of this modification staff also stipulates that contract language be modified such that AT&T will not be permitted to collocate fully equipped switching equipment (host class 5 switches), and may not use collocated RSUs to avoid payment of access charges. AT&T and USWC are encouraged to establish procedures, including an audit mechanism, that will guarantee that AT&T is not using RSUs for the purpose of bypassing access charges.

. . . .

APPENDIX B

[Excerpt from Transcript of June 25, 1997 Open Meeting before WUTC to consider approval of interconnection agreement between US West Communications, Inc. and AT&T Communications of the Pacific Northwest, Inc.]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between	DOCKET NO.
AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and U.S. WEST COMMUNICATIONS, INC.	UT-960309 VOLUME VIII PAGES 1112-1171
Pursuant to 47 USC Section 252	

A hearing in the above matter was held on June 25, 1997, at 1:30 p.m. at 1300 South Evergreen Park Drive Southwest before The Washington Utilities and Transportation Commission.

The parties were present as follows:

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, by DAN WAGGONER, Attorney at Law, 1501 Fourth Avenue, Suite 2600, Seattle, Washington 98101.

U.S. WEST COMMUNICATIONS, INC., by LARRY BROTHERSON, 7800 East Orchard Road, Suite 390, Englewood, Colorado 80111.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF, by JING ROTH, GLENN BLACKMON, and JEFF GOLTZ, 1300 South Evergreen Park Drive Southwest, Olympia, Washington 98504.

. . . .

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(COLLOQUY)
PROCEEDINGS

CHAIRMAN NELSON: This is a continuation of this morning's open meeting, we will resume order. We are here on the matter of the interconnection agreement between AT&T and U.S. West . . .

. . . .

MR. WAGGONER:

. . . .

1121

So those are the areas we would like to ask you to modify the contract and the arbitrator's recommendation. Let me start

with remote switching units, I think that can be relatively quick because that's an issue you have heard about quite a bit before and which has been extensively addressed in the Staff's earlier memo. We believe that remote switching units properly are co-located in U.S. West premises subject to the recommendations of Staff, that they be of limited size, and that they not be employed to avoid carrier access charges. The record in this case demonstrates that they increase efficiency in the sense that they avoid unnecessary use of trunking in some situations, and they also enhance the reliability of the network because if you are able to co-locate a remote switching unit, if the trunking between the

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remote switching unit and the main switching unit breaks down, the remote switching unit can provide some limited essentially intra-office type switching.

So it is both more efficient in the sense of avoiding over-use of inter-office trunking and it also enhances

reliability. And those are the two main points which I believe have caused Staff to recommend, their recommendation, and we are quite content with the limitations contained in Staff's recommendation. So that's that issue.

. . . .

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MR. BROTHERSON: I believe, as Mr. Waggoner laid out, the procedure I'm going to respond at this time to the issues he has raised, then bring up others secondarily on our motion to reconsider. I would also second Mr. Waggoner's statement that we also have raised a lot of detail in our brief, both sides have briefed these issues heavily, so I think while we want to touch on these expediently for the hearing today, we would certainly encourage that the additional argument set forth be taken into consideration. Based on a lot of dispute around RSU has dealt with it's ability to bypass access and our concerns

around that area based on AT&T's representations today that they concur with the Staff's, I think it was March 5th memo, and the language in there about not being available for access bypass. I think we too could concur with the Staff's memorandum on that, so I don't think that's an issue.

. . . .

Supreme Court, U.S.
FILED
OCT 11 2000
CLERK

(4)

No. 00-214

IN THE

Supreme Court of the United States

QWEST CORPORATION, INC.,
Petitioner,

v.

MCI WORLDCOM NETWORK SERVICES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent MCI WORLDCOM Network Services, Inc. states as follows:

On May 7, 1999, MCI Telecommunications Corporation changed its name to MCI WORLDCOM Network Services, Inc. MCImetro Access Services, Inc. is a wholly owned subsidiary of MCI WORLDCOM Network Services, Inc. MCI WORLDCOM Network Services, Inc., is a wholly owned subsidiary of MCI Communications Corporation which, in turn, is a wholly owned subsidiary of WorldCom, Inc. WorldCom, Inc., through its wholly owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally.

WorldCom, Inc is a publicly traded company on the Nasdaq National Market under the symbol "WCOM". No publicly held company owns 10 percent or more of WorldCom stock.

AT&T provides telecommunications, cable and other services. AT&T has no parent company. No publicly held company owns 10 percent or more of AT&T's stock.

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No. 00-214

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

Respondents MCI WORLDCOM Network Services, Inc. and MCImetro Access Transmission Services, Inc. (collectively, "MCI"), and AT&T Corp. ("AT&T") submit this brief in opposition to the petition for a writ of certiorari filed by U S West.[1]

---

[1] Although U S West has been renamed Qwest as the result of a merger, Respondents will use the name U S West in this opposition to be consistent with the decisions below and with U S West's petition.

U S West's petition should be denied for three reasons. First, U S West's challenge to the Ninth Circuit's ruling concerning combinations of unbundled elements does not warrant certiorari. Indeed, it presents a highly idiosyncratic issue that, to Respondents' knowledge, has not occurred before and is highly unlikely to occur again: whether a court of appeals in one circuit violates the Hobbs Act[2] when it follows the reasoning of an intervening Supreme Court decision and interprets a statute differently than did a Hobbs Act court in another circuit.

In any event, it plainly was correct – and not a violation of the Hobbs Act – for the Ninth Circuit to follow this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) ("*AT&T*"), rather than the Eighth Circuit's decision in that same case. The Ninth Circuit's decision did not intrude on the Eighth Circuit's Hobbs Act authority because the Ninth Circuit did not rule on the validity of subsections (c) through (f) and thus did not limit the Eighth Circuit's exclusive authority to review those rules. In addition, the Hobbs Act does not give the Eighth Circuit exclusive authority to interpret the underlying statute, and accordingly the Ninth Circuit's conflicting construction of 47 U.S.C. § 251(c)(3) does not implicate the Hobbs Act.[3]

This case also is not an appropriate vehicle for this Court to resolve the separate question of whether § 251(c)(3) of

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[2] 28 U.S.C. § 2342 *et. seq.*

[3] This Court only recently declined a request by U S West to review a very similar Ninth Circuit decision on virtually identical grounds. *U S West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000), *reh'g denied*, No. 99-1641, 2000 WL 1210656 (U.S. Aug. 28, 2000).

the Telecommunications Act of 1996 ("the 1996 Act" or "the Act")[4] forecloses unbundling requirements such as the one imposed by the state commission in this case. Although the Eighth and Ninth Circuits have construed the Act differently, and there is a conflict on the construction of § 251(c)(3), U S West did not present that underlying question of statutory interpretation in its petition for certiorari. Even if the issue had been properly presented to this Court, the same issue was presented in the petition for certiorari on the Eighth Circuit's remand decision,[5] which has already been filed with this Court and is a better vehicle for addressing the issue.[6]

Second, U S West's challenge to the Ninth Circuit's collocation decision is also unworthy of this Court's review. The FCC currently is reconsidering its collocation standards, and it will soon issue regulations affecting the collocation provision at issue here. Those regulations will then be subject to judicial review. If the FCC promulgates its regulations before this Court's decision, the issue here could become moot. Alternately, if the FCC issues its regulations shortly after this Court rules, this Court's decision could be almost immediately superseded by those regulations. Either way, the fact that there will soon be new federal rules on this precise subject sharply diminishes any continuing importance of the Ninth Circuit's decision.

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[4] Pub. L. No. 104-104, 110 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*).

[5] *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000).

[6] *See* Petition for a Writ of Certiorari, *WorldCom, Inc. v. Verizon Communications, Inc. et al.*, (U.S. filed Oct. 10, 2000) (Resp. App. 3a). AT&T likewise intends to file a petition for certiorari in the same case raising this issue, among others.

Moreover, this issue does not warrant certiorari because the Ninth Circuit's decision did not create a circuit split. The D.C. Circuit, sitting as the Hobbs Act court, vacated the FCC rules and remanded them, directing the FCC either to reverse them or to provide a better explanation. The Ninth Circuit did not disagree with that conclusion, and even indicated that it "might agree." Pet. App. 10a, 20a. It did not need to decide that point, however, because this case presented a distinct issue – whether the 1996 Act prohibited the state commission from directing the collocation of a particular type of equipment, remote switching units ("RSUs").[7] Indeed, the FCC's forthcoming rules on collocation may well require incumbents to permit the collocation of RSUs, and many parties to that FCC proceeding are urging the Commission to do precisely that in response to the D.C. Circuit's remand.

Finally, this Court should deny certiorari on U S West's third question presented, which purports to address the appropriate "standard of review." This is not a separate question, but is merely an additional argument in support of U S West's first two points. Moreover, this supplemental argument is simply a straightforward issue of statutory interpretation on which no circuit conflict exists. U S West's narrow reading of the Act's requirement that federal courts determine whether arbitrated provisions "meet the requirements of" the Act conflicts with the plain language and with the purpose of the Act and its implementing regulations, as well as the few cases in which courts have addressed the issue.

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[7] Remote switching units are a type of equipment used primarily for interconnection with an incumbent's network. RSUs route telecommunications traffic from the incumbent's network to the new entrant's main switch, and may perform limited switching functions.

STATEMENT OF THE CASE

A. The Telecommunications Act of 1996

The 1996 Act was enacted to end the "longstanding regime of state-sanctioned monopolies" that has prevailed in markets for local telephone service across the country for almost a century, *AT&T*, 525 U.S. at 371, and to replace it with a vibrant competitive market that will bring lower prices and better service to consumers "as quickly as possible." H.R. Rep. No. 104-204, at 89 (1995). Because local telephone markets were traditionally controlled by incumbent monopolists such as U S West – which own the facilities necessary to provide local phone service – the Act imposes a number of duties upon incumbents to ensure the advent of competition in the local telephone market. As this Court recognized, "[f]oremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) . . . to share its network with competitors." *AT&T*, 525 U.S. at 371. Specifically, incumbents must allow new competitors to: (i) "interconnect" their network facilities with those of the incumbent so that customers can call and be called by the incumbent's customers; (ii) lease unbundled elements of the existing network; and (iii) purchase and resell the incumbent's service. 47 U.S.C. § 251(c)(2), (3), (4).

1. The 1996 Act's Leasing Provisions and the FCC's Combinations Rules

Section 251(c)(3) requires an incumbent carrier to provide access to its network elements "in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service." 47 U.S.C. § 251(c)(3). The FCC concluded that this language requires incumbent carriers to provide unbundled network elements in combined

form when new entrants so request. *See* 47 C.F.R. § 51.315; *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, ¶¶ 293-297 (1996) ("*Local Competition Order*"). FCC Rule 315(b) thus mandates that incumbent carriers lease combinations of unbundled elements that generally exist in the incumbent's network. Subsections (c) through (f) of the Rule require incumbents to combine elements for a requesting new entrant, and to combine the incumbent's elements with those of the new entrant.

Upon its release in August 1996, the Local Competition Order was subject to numerous challenges brought under the Hobbs Act, 28 U.S.C. § 2342. These challenges were consolidated for review in the Eighth Circuit, which invalidated Rules 315(b)-(f). *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) ("*Iowa Utils. Bd. I*"), *rev'd in part and aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Eighth Circuit concluded that § 251(c)(3)'s statement that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service," 47 U.S.C. § 251(c)(3), "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Iowa Utils. Bd. I*, 120 F.3d at 813. Thus, the Eighth Circuit concluded, "unbundled" can only mean physically separated. 120 F.3d at 813.

This Court reversed, explicitly rejecting the Eighth Circuit's conclusion that § 251(c)(3) allows the leasing only of "discrete pieces" of network elements. *AT&T*, 525 U.S. at 393-95. The Court rejected the incumbents' argument that "unbundled" as used in § 251(c)(3) means physically separated

into pieces, emphasizing that § 251(c)(3) "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *AT&T*, 525 U.S. at 394. Because nothing in the Act itself precludes a requirement that incumbents lease network elements in combined form, and because the FCC's justification for imposing the combinations rule was reasonable, the Court upheld the FCC's requirement that incumbents provide access to existing combinations of network elements. *Id.* at 395.

Although it rejected the basis upon which the Eighth Circuit invalidated the FCC's combinations rules, this Court did not expressly rule on the validity of Rules 315(c)-(f). Accordingly, the Eighth Circuit considered on remand whether it should reinstate those subsections of Rule 315 in light of the Supreme Court's decision. *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758-59 (8th Cir. 2000) ("*Iowa Utils. Bd. II*"). Despite this Court's statement that the Act does not say "that elements must . . . never [be provided] in combined form," *AT&T*, 525 U.S. at 394, the Eighth Circuit again held, without addressing the Act's nondiscrimination requirements, that those rules should "remain vacated" because § 251(c)(3) indicates that new entrants are responsible for combining elements themselves. 219 F.3d at 758-59.

2. The 1996 Act's Collocation Provisions and FCC Collocation Rules

Section 251(c)(6) of the Act requires that incumbents "provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. . . ." 47 U.S.C. § 251(c)(6). Collocation is the means by which

new entrants interconnect their networks with that of the incumbent in order to exchange traffic with the incumbent and to gain access to unbundled elements of the local network. The FCC addressed the Act's collocation requirements in the *Local Competition Order*, concluding that the term "necessary," as used in § 251(c)(6), meant "used" or "useful." *See Local Competition Order* ¶ 579. The challenges to the Local Competition Order presented to the Eighth Circuit did not address the FCC's collocation requirements.

The FCC subsequently issued an order that clarified and strengthened the collocation requirements. *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 F.C.C.R. 4761 (1999) ("*Collocation Order*"). The Commission concluded, *inter alia*, that incumbents must allow collocation "of any equipment that is 'used or useful' for either interconnection or access to unbundled network elements, regardless of other functionalities inherent in such equipment." *Id.* ¶ 28; 47 C.F.R. § 51.323. Accordingly, incumbents must collocate RSUs and other equipment with multiple functionalities. *See Collocation Order* ¶¶ 28-29.

Several incumbents challenged the *Collocation Order* in the D.C. Circuit. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). They asserted that the FCC had adopted overly broad definitions of several terms, including "necessary," that the new requirements were not authorized by the Act, and that the collocation requirements imposed an unconstitutional taking. The D.C. Circuit rejected most of these claims, but concluded that in light of this Court's rejection of FCC Rule 319's use of a similar definition of

"necessary," *see AT&T*, 525 U.S. at 387-92,[8] the FCC must either revise its rules or provide a "better explanation" for its existing ones. 205 F.3d at 424. The FCC subsequently issued a Notice of Proposed Rulemaking in which it invited comment on the issues raised by the remand, including the proper treatment of RSUs and other varieties of telecommunications equipment. *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC No. 00-297,¶ 74 (rel. Aug. 10, 2000) ("*Collocation NPRM*").

3. The 1996 Act's Procedures for Establishing the Terms of a New Entrant's Use of the Local Network

The Act establishes two different ways in which a new entrant and an incumbent carrier can reach an "interconnection agreement" – a contract that sets forth the terms and conditions under which the new entrant will have access to the incumbent's network. The first is negotiation: under § 252(a)(1), a new entrant may request that the incumbent carrier engage in negotiations to determine the terms and conditions by which the new entrant will lease network elements. 47 U.S.C. § 252(a)(1). The only constraints on negotiated terms are: (i) the term must not discriminate against a carrier not party to the agreement, and (ii) the term must be

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[8] In *AT&T*, this Court reviewed, *inter alia*, the FCC's implementation of 47 U.S.C. § 251(d)(2)'s requirement that "[i]n determining what network elements should be made available for purposes of [§ 251] (c)(3). . . , the Commission shall consider, at a minimum, whether – (A) access to such network elements as are proprietary is necessary . . . ." 525 U.S. at 387-88. The Court concluded that the FCC had not met its statutory obligation to give the "necessary" standard some substance. *See id.* at 387-92.

consistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(a)(1); *id.* § 252(e)(2); *AT&T*, 525 U.S. at 372-73 (noting that an incumbent may "negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or (c)") (footnote omitted).

The second method is arbitration. After a fixed time, if the parties fail to agree on all terms and conditions of interconnection, they may submit the unresolved issues to a state utility commission for compulsory arbitration. 47 U.S.C. § 252(b)(1). Any arbitrated term must be consistent with all applicable terms of the 1996 Act, and all binding FCC regulations. *See* 47 U.S.C. § 252(c)(1); § 252(e)(2)(B).

Once the arbitration is completed, the arbitrated terms are combined with the negotiated terms in a final agreement which is submitted to the state commission for approval. 47 U.S.C. § 252(e)(1). In reviewing the terms, the commission must determine whether each complies with the standards set out above – that is, whether the arbitrated terms comply with the 1996 Act and the FCC's regulations, and whether the negotiated terms are non-discriminatory and consistent with the public interest. 47 U.S.C. § 252(e)(2)(A); § 252(e)(2)(B). The state commission's final determination is subject to review in federal district court, which is charged with making the same inquiry. *See* 47 U.S.C. § 252(e)(6).

B. The Proceedings Below

1. -The MCI/U S West Interconnection Agreement

After months of negotiations with U S West, MCI filed a petition for compulsory arbitration of unresolved issues with

the Washington Utilities & Transportation Commission ("WUTC"), pursuant to § 252(b) of the 1996 Act. The WUTC conducted hearings and received written submissions from the parties over a period of several months, and on December 23, 1996, issued an order resolving most of the disputed issues and ordering the parties to submit a completed interconnection agreement. A WUTC-appointed mediator resolved remaining disputes as to certain other terms of the agreement. The WUTC approved the final MCI/U S West interconnection agreement pursuant to § 252(e)(2)(B) of the Act on August 18, 1997. The WUTC amended its order approving the agreement between MCI and U S West on August 27, 1997.

Both MCI and U S West filed complaints in the United States District Court for the Western District of Washington pursuant to § 252(e)(6) of the Act, challenging certain WUTC decisions as incorporated into the MCI/U S West Agreement. U S West there contested, *inter alia*, the WUTC's requirement that it combine unbundled network elements at MCI's request.[9] *See* Pet. App. 28a-29a. MCI argued, *inter alia*, that even if combinations were no longer required under federal law, the WUTC's interpretation of Washington law in a similar proceeding demonstrated that the combinations provision was still required in this case. MCI's Opposition to U S West's Motion for Summary Judgment, *MCI Telecommunications Corp. v. U S West Communications, Inc.*, No. C97-1508R, at 7-8 (filed April 14, 1998); *see In re the Petition for Arbitration*

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[9] The agreement provides: "U S West shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to its subscribers." Agreement for Local Wireline Network Interconnection and Service Resale Between MCImetro Access Transmission Services, Inc. and U S West Communications, Inc., Attachment 3 ¶ 2.4 (Resp. App. 2a) ("MCI/U S West Agreement").

of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Incorporated Pursuant to 47 U.S.C. Section 252, Docket No. UT-960307, 1998 WL 223213 (WUTC March 16, 1998) (imposing combination requirement on incumbent GTE as a matter of state law) ("GTE Order"). *See also* Brief of the WUTC in Opposition to U S West Petition for Certiorari, *Qwest Corp., Inc. v. MCI WORLDCOM Network Services, Inc.* No. 00-214, at Part I.C., (U.S. filed Oct. 10, 2000). In addition, U S West asserted that the requirement that it allow MCI to collocate its RSUs at U S West facilities violated the Act.[10] *See* Pet. App. 32a-34a.[11]

The district court issued an order on July 21, 1998, resolving the parties' claims. The district court vacated the provision in the agreement requiring U S West to combine network elements for MCI. *See* Pet. App. 27a-29a. The court based its reversal on the Eighth Circuit opinion in *Iowa Utils. Bd. I*, 120 F.3d at 813, Pet. App. 28a-29a, vacating the FCC combinations rules. In addition, the district court rejected U S West's challenge to the interconnection agreement's requirement that U S West allow collocation of RSUs. It approved the WUTC's determination that remote switching units are "necessary for interconnection or access to unbundled network elements." Pet. App. 33a-34a.

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[10] The agreement provides: "MCIm may collocate transmission equipment (including Digital Cross Connect Systems and Remote Switching Units (RSUs) to terminate basic transmission facilities but MCIm shall not use physically collocated equipment to avoid payment of access charges." MCI/U S West Agreement ¶ 40.1.5 (Resp. App. 1a).

[11] The issues that MCI contested are not at issue here.

U S West and MCI timely appealed the district court's decision to the Ninth Circuit.

2. The AT&T/U S West Interconnection Agreement

AT&T commenced negotiations with U S West in March of 1996. Numerous issues were disputed, and the matter was referred to arbitration on July 25, 1996. The arbitrator issued a decision on December 9, 1996, and then modified it on January 16, 1997. On July 11, 1997, after further proceedings before the WUTC, the WUTC issued an order modifying the arbitrator's decision in part and approving the resulting interconnection agreement.

On August 11, 1997, U S West brought suit in the United States District Court pursuant to § 252(e)(6) of the Act, challenging sixteen aspects of the WUTC decision, including the network element combinations and RSU collocation issues it raises here. While the district court proceedings were pending, the WUTC issued a reconsideration order addressing GTE Corp.'s challenge to the combinations provisions contained in its arbitrated interconnection agreement with AT&T. In that order, the WUTC held that it had state law authority to order combinations of UNEs, and that an incumbent's failure to offer combinations would violate several provisions of Washington telecommunications law. *See* GTE Order. The WUTC and AT&T opposed U S West's motion for summary judgment by showing, *inter alia*, that the WUTC's network element combinations decision not only was correct as a matter of federal law, but also rested on the independent state law grounds identified in the GTE proceeding.

The district court issued its decision on July 21, 1998. The court vacated the network element combinations provision, holding that it violated federal law as construed by the Eighth Circuit in *Iowa Utils. Bd. I.* It further held that *Iowa Utils. Bd. I* likewise established that the separate state-law ground on which the WUTC had relied was preempted. *See* Pet. App. 60a. At the same time, the Court upheld the decision to require the collocation of RSUs, holding that it "was neither arbitrary nor capricious, was based on sufficient evidence, and was within the WUTC's discretion to decide." Pet. App. 66a.

The AT&T appeal was consolidated in the Ninth Circuit with MCI's appeal and a similar appeal arising out of the WUTC's arbitration of an interconnection agreement between Sprint Communications Co. ("Sprint") and U S West.

3. The Ninth Circuit Decisions

In a March 2, 2000, ruling, the Ninth Circuit reversed the district court's combinations decisions. It found that under this Court's interpretation of § 251(c)(3) of the 1996 Act in *AT&T*, the provisions requiring U S West to provide competing carriers with combinations of otherwise separate elements did not violate the Act, even if such a provision was no longer mandated by FCC regulations. Pet. App. 8a-9a, 20a, 23a. The Ninth Circuit also upheld the provisions requiring U S West to collocate remote switching units. Pet. App. 11a.

REASONS FOR DENYING THE WRIT

I. THE HOBBS ACT ISSUE IDENTIFIED BY U S WEST DOES NOT WARRANT REVIEW, AND THE CONFLICT U S WEST HAS IDENTIFIED RESPECTING § 251(C)(3) SHOULD NOT BE RESOLVED IN THIS CASE.

The first question presented in U S West's petition raises an issue involving the Hobbs Act[12] which is not worthy of this Court's review. Although there is a circuit conflict on the underlying question of the meaning of § 251(c)(3) of the 1996 Act, U S West does not raise that question here, and it is best addressed in another case.

A. This Case Does Not Raise Any Hobbs Act Concerns.

This case raises no Hobbs Act issue. The Ninth Circuit's decision does not usurp the Eighth Circuit's Hobbs Act jurisdiction because the Ninth Circuit did not purport to review the FCC's rule and certainly did not reinstate subsections (c) through (f). Nothing in the Ninth Circuit's decision limited the Eighth Circuit's ability to affirm its prior decision to strike down those subsections. Accordingly, the Ninth Circuit's

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[12] The Hobbs Act gives "[t]he court of appeals . . . exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342. In addition, it provides that "[t]he court of appeals in which the record on review is filed. . . has exclusive jurisdiction to make and enter. . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." *Id.* § 2349.

decision did not disturb the Eighth Circuit's exclusive authority to "enjoin[], set[] aside, or suspend[]" the FCC's rules. *See* 28 U.S.C. § 2349(a).

Although the Ninth Circuit's understanding of the meaning of the Act differs from that the Eighth Circuit announced in the remand proceedings, that divergence does not implicate the Hobbs Act. The Hobbs Act gives the Courts of Appeals exclusive jurisdiction to review all final orders of the FCC. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996). As the court in which the direct appeals of the FCC's *Local Competition Order* and related rules have been consolidated, *see* 28 U.S.C. § 2112(a)(3), there is no question that the Eighth Circuit is charged with assessing the validity of the FCC's regulations and entering any order "enjoining, setting aside, or suspending, in whole or in part," the agency's rules. 28 U.S.C. § 2349(a). However, no court has ever construed this language to mean that, because a Hobbs Act court engages in statutory construction in the process of "determining the validity of" a Commission order, *id.*, it thereby gains exclusive power to construe the underlying statute.[13] The Eighth Circuit surely did

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[13] The structure and legislative history of the Hobbs Act provide further confirmation that the Eighth Circuit's exclusive jurisdiction extends only to assessing the FCC's *Local Competition Order*, not to construing the statute behind it. The Hobbs Act is not structured to set up a quasi-Supreme Court with exclusive control over a particular area of federal law. Instead, it is designed to conserve judicial resources by ensuring that only one appellate court reviews the administrative record supporting the agency's decision and to guarantee that an agency order is not subject to continuous attack after a chosen court has evaluated its validity. *See, e.g*, S. Rep. No. 81-2618, at 4-5 (1950); H.R. Rep. No. 81-2122, at 3-4 (1950); S. Rep. No. 85-2129, at 2-5 (1958). In keeping with this purpose, the bulk of the Hobbs Act is devoted to the appropriate treatment of the administrative record, the

not become the sole interpreter of the 1996 Act simply because it happened to construe the statute when assessing the FCC's rule.[14]

B. U S West's Purported Hobbs Act Issue is too Narrow to Warrant Review.

Moreover, even if this Court finds that this case raises a Hobbs Act concern, the procedural setting of this case is highly idiosyncratic. This Court interpreted the 1996 Act in its review of FCC regulations, and the Ninth Circuit then analyzed that interpretation in assessing the meaning of the 1996 Act in a case not involving the regulations. Subsequently, the Hobbs Act court on remand considered the impact of the Supreme Court's decision on related FCC regulations. Thus, the question U S West seeks to have addressed is whether, in these unique circumstances, the earlier court of appeals opinion is somehow rendered invalid by the subsequent Hobbs Act court's decision. This issue necessarily arises only in cases in this complex procedural posture—cases that are rare, at best. Because the issue is so narrow, this Court should decline to review the purported Hobbs Act issue on this basis alone.

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agency, and its order; it makes no mention of the reviewing court's power with regard to the underlying statute itself. *See, e.g.*, 28 U.S.C. §§ 2344, 2346, 2347; *see also* S. Rep. No. 81-2618, at 4-5 (1950); H.R. Rep. No. 81-2122, at 3-4 (1950). To the contrary, it is well accepted that each Court of Appeals has the authority to construe statutes and need not follow the holdings of other Courts of Appeals construing the same statutes. Nothing in the Hobbs Act purports to disturb that principle.

[14] For this reason, U S West's suggestion that the Court simply grant certiorari to vacate and remand the Ninth Circuit's ruling with instructions to follow the Eighth Circuit's substantive ruling is unwarranted.

The issue is made even less suitable for review by virtue of the independent state law grounds supporting the WUTC's holding. As the WUTC explained to the district court in the AT&T case, even if it had misconstrued federal law, its decision on network element combinations would still be supported by the state law grounds it had identified in a parallel case involving GTE. *See* GTE Order. The Ninth Circuit did not need to address those state-law ground because of its holding on federal law, but those grounds independently justify the network element combinations requirement at issue here.

C. This Case is Not the Proper Vehicle to Address Conflicting Interpretations of § 251(c)(3).

Nor should certiorari be granted in this case to resolve the underlying question whether the text of § 251(c)(3) unambiguously forecloses the kinds of unbundling requirements upheld by the Ninth Circuit in this case. Although the Eighth and Ninth Circuits have reached conflicting results on that question, U S West did not present it in its petition for certiorari. *See Bill Johnson's Restaurant's, Inc. v. NLRB*, 461 U.S. 731, 737 n.4 (1983) (citing Sup. Ct. Rule 34.1(a)). And even if it were fairly encompassed within the question U S West did present, review in this case would still be unwarranted. A petition for certiorari in the Eighth Circuit's Hobbs Act remand case has been filed with this Court. *See* Resp. App. 3a. Among the issues presented in that petition is whether the Eighth Circuit erroneously invalidated subsections (c)-(f) of Rule 315, which required incumbent carriers to combine otherwise separated elements at a competitor's request. That is plainly the better vehicle for addressing the issue because it presents the issue in the context of the administrative rulemaking record on which the FCC

relied. Thus, U S West's petition on this issue should either be denied or held pending disposition of the petition in *Iowa Utils. Bd. II*. In no event, however, should it be granted.

II. THE NINTH CIRCUIT'S COLLOCATION DECISION PRESENTS NO ISSUE WORTHY OF THIS COURT'S REVIEW.

The second question presented in U S West's petition for certiorari is likewise unworthy of review. There is simply no reason to address the Ninth Circuit's interpretation of the 1996 Act's collocation requirements because the FCC is in the process of issuing new implementing regulations that will likely render that issue moot. In any event, the Ninth Circuit's ruling does not conflict with either the D.C. Circuit's decision in *GTE Services v. FCC* or this Court's previous ruling in *Iowa Utils. Bd. I*.

A. This Court Should Deny Certiorari Because the FCC Will Soon Issue Additional Collocation Regulations.

The imminent release of an FCC Order governing collocation strongly counsels against granting certiorari. The FCC is currently reevaluating the Collocation Order on remand from the D.C. Circuit. *See Collocation NPRM* ¶¶ 70-84. Specifically, the D.C. Circuit ordered the FCC either to revise its rules or to provide a better explanation for the existing ones. *See GTE*, 205 F.3d at 424. The FCC will also consider additional aspects of the collocation rules. *Collocation NPRM* ¶¶ 1-7. Initial comments in this proceeding are due on October 12, 2000. FCC Public Notice, *Common Carrier Bureau Extending Pleading Cycle*, CC Docket No. 98-147, DA 00-2036 (rel. Sept. 6, 2000). The resulting rules may well require

collocation of RSUs: many of the parties to the proceeding will be arguing for that result, which is perfectly consistent with the D.C. Circuit's decision.

The FCC's consideration of this matter will probably conclude before this Court would begin to review U S West's petition, and the FCC will likely issue new collocation regulations before this Court could rule in this case. Once issued, those rules will govern in any court or commission proceeding involving challenges to collocation requirements within the scope of the regulations. Because the new FCC rules will address the terms of collocation challenged by U S West in this case, this Court's decision could be quickly superceded by FCC regulations. That is so whether or not this Court grants U S West's petition: if the Court grants certiorari and the FCC rule issues, the Court will likely remand to the WUTC for reconsideration in light of the new rules; if this Court denies certiorari, one of the parties will likely request the WUTC to review the agreement for compliance with the new rules.[15] Thus, review of the collocation issue is unwarranted.

B. The Ninth Circuit's Holding Does Not Conflict With Either the D.C. Circuit or This Court's Precedent.

U S West's petition for certiorari significantly overstates the degree of overlap between the Ninth Circuit opinion and the rulings of the D.C. Circuit in *GTE* and this Court in *AT&T*. In *GTE* and *AT&T*, the courts interpreted the 1996 Act in the context of determining the validity of FCC implementing

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[15] Because there will be a binding FCC regulation in place, the WUTC would be required to follow the FCC rule, and not the Ninth Circuit's interpretation of the Act.

regulations. In *GTE*, the D.C. Circuit addressed a direct challenge to the FCC's Collocation Order. The court concluded that the FCC's definition of "necessary" as "used or useful" should either be revised or "better expla[ined]." *GTE*, 205 F.3d at 422-24. In *AT&T*, this Court reviewed the consolidated Eighth Circuit challenges to several FCC rules, none of which involved collocation, and concluded that in the context of determining access to unbundled network elements, Rule 319's definition of the "necessary" standard did not satisfy § 251(d)(2). *See* 525 U.S. at 387-92.

The Ninth Circuit, on the other hand, did not purport to address the validity of the FCC's collocation rules, much less opine on the definition of "necessary" as used in those regulations. The court expressly rejected U S West's invitation to issue such a comprehensive ruling, and limited its review to determining whether the arbitrated collocation provisions were contrary to the 1996 Act's requirements. *See* Pet. App. 11a. Specifically, the court concluded that the provisions in the MCI and AT&T interconnection agreements requiring the collocation of RSUs did not violate the Act because the 1996 Act did not prohibit such requirements. *See* Pet. App. 11a, 20a. The Ninth Circuit did not rule on the FCC regulations, and indeed indicated that, were it doing so, it "might agree" with a statutory interpretation consistent with the D.C. Circuit's interpretation. *See* Pet. App. 10a, 20a. Accordingly, its opinion in no way intrudes on the D.C. Circuit's Hobbs Act authority or creates a circuit conflict. *See* Part I, *supra.*

The fact that courts have invalidated the FCC's previous definitions of necessary does not mean that the Ninth Circuit's affirmance of the WUTC ruling violated the 1996 Act. The D.C. Circuit did not hold that the 1996 Act expressly prohibits physical collocation requirements such as the one incorporated

into the MCI and AT&T interconnection agreements. Instead, the court held that the 1996 Act did not require that collocation be as extensive as that mandated by the FCC's *Collocation Order*, and remanded for further consideration. *See GTE*, 205 F.3d at 422-24. In *AT&T*, this Court also spoke in terms of what the 1996 Act affirmatively requires. The cases were silent on the independent legality of collocation requirements – focusing instead on the FCC's exercise of its rulemaking authority. Accordingly, neither case supports U S West's conclusion that the collocation provisions themselves are unlawful if included in an interconnection agreement, and the only courts to address the issue have disagreed with U S West's conclusion. *See Southwestern Bell v. Waller Creek Communications, Inc.*, 221 F.3d 812, 821 (5th Cir. 2000); *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 572-73 (7th Cir. 1999) ("*Illinois Bell v. WorldCom*").

U S West's additional assertion that the 1996 Act "provides for collocation *only* where it is 'necessary,'" Pet. at 17, and that any arbitrated requirement that arguably requires more than that violates the Act, assumes that the Act imposes an outer limit on the provisions a state commission may include in interconnection agreements. However, as set forth below, the 1996 Act is a floor, and not a ceiling, on the requirements that state commissions may impose. *See* Part III, *infra*; *Collocation Order* ¶ 23 (acknowledging state commissions' authority to impose additional requirements to further the pro-competitive goals of the Act). Thus, this issue is not worthy of this Court's review.

III. U S WEST'S "STANDARD OF REVIEW" ARGUMENT PRESENTS A SIMPLE QUESTION OF STATUTORY INTERPRETATION THAT DOES NOT WARRANT THIS COURT'S REVIEW.

U S West's third question, which purports to address the appropriate "standard of review," does not merit this Court's review. Indeed, it is not a separate question at all. Even on U S West's view, overturning the Ninth Circuit on this point would affect the result *only* on the two issues independently raised in the petition: (i) whether the Ninth Circuit erred in upholding the WUTC's combinations requirement, and (ii) whether the Ninth Circuit erred in upholding the WUTC's collocation requirement. Thus, the purported "standard of review" question is merely an additional argument in support of the other issues U S West has raised. As demonstrated, those questions do not warrant review. Nothing in U S West's third question presented changes that conclusion.

Moreover, this purported standard of review question presents nothing more than a straightforward issue of statutory interpretation on which no circuit conflict exists. U S West advocates a narrow interpretation of the 1996 Act's requirement that federal courts examine whether terms that state commissions impose during arbitration "meet the requirements of" the Act and its implementing regulations. *See* Pet. at 24; 47 U.S.C. § 252(e)(6). According to U S West, this provision means that state public utility commissions "may impose only those conditions that are *required* by federal standards," Pet. at 20 (emphasis added), and must require that incumbents take only those pro-competitive steps that the Act "*affirmatively mandate[s]*." Pet. at 24. If state commissions exceed this extremely limited authority, U S West contends, they violate the Act and basic principles of federal primacy.

All courts that have addressed the issue have adopted the contrary view: the fact that a provision is not affirmatively required by the Act or its implementing regulations does not necessarily mean that its inclusion violates, or is inconsistent with, the Act. *See Waller Creek*, 221 F.3d at 821; Pet. App. 11a; *Illinois Bell v. WorldCom*, 179 F.3d at 574. Neither the Eighth Circuit in *IUB* nor the D.C. Circuit in *GTE* addressed the question of whether the Act provides a floor but not a ceiling for state regulation; those courts' review solely concerned the validity of FCC regulations, and thus the courts did not pass on the legitimacy of imposing similar requirements in the absence of regulations.

In any event, U S West's position is plainly wrong. Such a restrictive view of the role of state commissions cannot be reconciled with the provisions of the Act in which Congress empowers state commissions to supplement the Act's requirements when setting terms of interconnection. *See, e.g.*, 47 U.S.C. §§ 251(d)(3), 261(c), & 252(e)(3). It also flatly contradicts the FCC's clear expectation that state commissions will go beyond the "*minimum obligations*" that FCC regulations provide. *Local Competition Order* ¶ 54 (emphasis added); *see id.* ¶¶ 58, 66, 180, 243; *see also Collocation Order* ¶ 23. Here, the WUTC can impose – and indeed has imposed -- requirements like the ones at issue in this case on the basis of state law. *See* Part I.B., *supra*. That fact alone renders the issues presented here unworthy of this Court's review.

In sum, U S West's narrow construction of state commission authority finds no support in the Act or its implementing regulations, and it conflicts with the practical reality of the arbitration process. Therefore the petition should be denied on this issue.

CONCLUSION

The petition for certiorari should be denied, or, at most, should be held pending disposition of the petition in *Iowa Utils. Bd. II.*

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October 10, 2000

APPENDIX

APPENDIX A

AGREEMENT FOR LOCAL WIRELINE NETWORK
INTERCONNECTION AND SERVICE RESALE
Between
MCImetro Access Transmission Services, Inc.
and
U S WEST Communications, Inc.

* * * *

40. Collocation

40.1 General Description

* * * *

40.1.5 MCIm may collocate transmission equipment (including Digital Cross Connect Systems and Remote Switching Unites (RSUs)) to terminate basic transmission facilities but MCIm shall not use physically collocated equipment to avoid payment of access charges. MCIm and U S WEST shall establish procedures, including an audit mechanism, that will demonstrate that MCIm is not using RSUs for the purpose of bypassing access charges.[7] MCIm must identify what equipment will be installed, to allow for U S WEST to use this information in engineering the power, floor loading, heat release, environmental participant level, and HVAC.

* * * *

---

[7]Staff Recommendations, dated August 11, 1997, pp. 2-3.

Attachment 3

UNBUNDLED ACCESS/ELEMENTS

* * * *

2. Unbundled Network Elements

* * * *

2.4 U S WEST shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to its subscribers. MCIm may purchase unbundled Network Elements without restriction as to how MCIm rebundles those elements.

* * * *

APPENDIX B

No.

IN THE

Supreme Court of the United States

WORLDCOM, INC.,

Petitioner,

v.

VERIZON COMMUNICATIONS, INC. *et al.*

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

* * * *

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II. THE EIGHTH CIRCUIT'S INVALIDATION OF §§ 51.315(C)-(F) OF THE FCC'S RULES CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT AND THIS COURT'S DECISION IN *AT&T v. IUB.*

This Court should also grant certiorari to review the Eighth Circuit's invalidation of 47 C.F.R. §§ 315(c)-(f), which require incumbents, upon request, to combine leased elements in their

network that are not already combined, or to combine leased elements in their network with the elements of new entrants.

1. The Eighth Circuit's decision is in direct and acknowledged conflict with two decisions of the Ninth Circuit. Pet. App. 21a-22a. While the Eighth Circuit was reconsidering its combinations decision on remand from this Court, the Ninth Circuit was called upon to assess the validity of an interconnection agreement arbitrated by the Washington state commission. That agreement included a requirement that, if requested by a new entrant, elements be provided in combination. Because the Eighth Circuit was reconsidering the validity of its rules, the Ninth Circuit assumed that sections (c)-(f) were not in force and that no FCC rule *mandated* "new" combinations. The Ninth Circuit thus turned to the question of whether the Act itself permits a state commission to impose such a requirement and concluded that, "under the rationale of *AT&T Corp.*," the provision was plainly valid. Citing this Court's holding in *AT&T* that nothing in the 1996 Act mandates that elements be provided only in separated form, the Ninth Circuit concluded that "[i]t . . . necessarily follows" that a provision requiring an incumbent to provide new combinations "does not conflict with the Act because the Act does not say or imply that network elements may only be leased in discrete parts." *U S West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000). The Ninth Circuit reiterated

this conclusion in a later case in which the same issue was presented, stating flatly that "the Eighth Circuit's interpretation of the Act was incorrect." 204 F.3d at 1268.

In the decision at issue here, the Eighth Circuit subsequently expressed its disagreement with the Ninth Circuit's analysis and reaffirmed its earlier decision that §§ 315(c)-(f) "violate the plain language of the statute" and, therefore, would remain vacated. Pet. App. 23a. Thus, as each of these courts acknowledges, there is a conflict between the Eighth and Ninth Circuits over the meaning of § 251(c)(3) of the Act.

2. The Eighth Circuit's invalidation of Rules 315(c)-(f) also conflicts directly with this Court's decision in *AT&T*. In *IUB*, the Eighth Circuit struck down Rules 315(b)-(f), on the basis that they conflicted with the Act's plain language. This Court reviewed only the invalidation of § 315(b) – which prohibits incumbents from separating network elements that are already combined – and reversed. In doing so, this Court rejected the argument that, in requiring the incumbent to provide network elements in a manner that "allows requesting carriers to combine" them, Congress contemplated the provisioning of elements *only* in physically separate pieces. Although the Act "assuredly contemplates that elements may be requested and provided in this form," this Court held, "it does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *AT&T*, 525 U.S. at 394. In short, "[t]he reality is that § 251(c)(3) is ambiguous," and, pursuant to *Chevron*, the FCC's reasonable combinations regulation must therefore be upheld. *Id.* at 395.

On remand, the Eighth Circuit directed the parties to brief whether this Court's decision affected the validity of §§ 315(c)-(f). *See Iowa Utils. Bd. v. FCC*, No. 96-3321, *et al.*, Order on Remand from the Supreme Court of the United States, ¶ 7a (8th Cir. filed June 10, 1999). Yet, without even acknowledging

this Court's decision, the Eighth Circuit once again invalidated the

rules "[u]nder the first prong of Chevron," reasoning that "Congress has directly spoken on the issue of who shall combine previously uncombined elements. It is the requesting carrier who shall 'combine such elements.'" Pet. App. 22a-23a. Thus, the Eighth Circuit concluded, the plain language of the Act prohibits any FCC rule other than one requiring incumbents to provide access to unbundled network elements *only* in separated fashion and never in combined form. *Id.* That decision cannot be reconciled with this Court's reading of § 251(c)(3).

3. The restoration of Rules 315(c)-(f) is important to ensure that new competitors are not "seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets." *Local Competition Order* ¶ 293 (Pet. App. 40a-41a). In particular, the FCC noted that "in practice it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbents' network without the assistance of the incumbent." *Id.* Thus, the FCC concluded that as a practical matter, new entrants cannot simply take uncombined elements within the incumbent's network and combine them themselves. Absent a requirement that the incumbent do the combining, competitors could thus not use unbundled network elements – the most promising of the Act's mechanisms for developing competition – to provide local service.

The real-world consequences of the Eighth Circuit's invalidation of Rules 315(c)-(f) are even graver than the FCC

anticipated. Not only do new entrants lack the information necessary to enter an incumbent's facilities and combine elements, incumbents have flatly prohibited them from doing so. Thus, despite the Eighth Circuit's blithe assertion in *IUB*, 120 F.3d at 813, that "the fact that the incumbent LECs object to [the FCC's combinations] rule[s] indicates . . . that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them," incumbents

have repeatedly indicated that they would *not* allow new entrants to access their facilities in order to combine elements. In state arbitrations, for example, Southwestern Bell has asserted that the Texas Commission must deny such access because Southwestern Bell "has grave concerns regarding the implications of such an order on the security, integrity and reliability of its network; the quality of its service, and the privacy of its customers." Brief on Eighth Circuit Alternatives, *In re Petition of MFS*, Docket Nos. 16189 *et al.*, at 11 (Tex. Pub. Util. Comm'n filed Oct. 27, 1997). The former Bell Atlantic has similarly warned against allowing a new entrant's employees "with wire snips and screwdriver in hand, to work on" its equipment. Joint Brief of Interveners in Support of the FCC, *Iowa Utils. Bd. v. FCC*, No. 96-3321 at 59 (8th Cir. filed Aug. 16, 1999) (quoting Statement of Donald Albert ¶ 23). For its part, BellSouth has termed such access "an unwarranted and illegal intrusion." *Id.* (quoting Reply Affidavit of Alphonso Varner at 14); *see also id.* (citing Collaborative Process Rebuttal Affidavit of William Deere). Indeed, petitioner is unaware of a single instance in which an incumbent allowed competing carriers access to the incumbent's elements in order to combine them.

This issue has taken on even greater importance because incumbents are rapidly expanding the scope of what they claim are "new" combinations. Seizing on the Eighth Circuit's decision, the incumbents consistently assert that any instance in which they have to combine elements, whether physically or electronically, is a new combination that they do not have to provide. Thus, when a consumer orders a second line for internet use, for example, incumbents have asserted that attaching the loop from that house to the incumbent's switch constitutes a new combination that need not be provided to new entrants. And, as explained above, incumbents are refusing to allow new entrants into the incumbents' facilities to do the combining themselves. This leads to the anticompetitive result that, if a customer orders a second line, that customer must first

obtain service from the incumbent (which does the combining) and then switch providers.

In short, just as the expert agency predicted, Rules 315(c)-(f) offer the only practical means to ensure that new entrants are able to obtain the elements they lease in a manner that allows them to use those elements to provide local service. In light of the importance of these rules to new entrants' ability to compete in local markets, review is plainly warranted.

(5)

No. 00-214

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

QWEST CORPORATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

SPRINT COMMUNICATIONS CO. L.P., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court that the Rule 29.6 statement filed with its petition for a writ of certiorari is still complete and accurate.

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INTRODUCTION

Respondents fundamentally misdescribe what the Ninth Circuit has done in the decision under review. This is not simply a case of co-equal federal courts reaching different results on abstract questions of statutory interpretation, *cf.* WUTC Opp. at 12-14, 17; Sprint Opp. at 11-13; MCI Opp. at 16,[1] or of the invalidation of a preemptive federal rule leaving some vacuum for states to fill as they wish, *cf.* WUTC Opp. at 12, 17. Instead, the Ninth Circuit has asserted the effective power to *nullify* Hobbs Act review in other circuits by authorizing state regulators to continue "implementing" FCC rules that those other circuits have vacated. Whereas the Eighth Circuit held on direct review that the FCC violated the Telecommunications Act of 1996 by requiring incumbent carriers to reconfigure their networks on demand and vacated the FCC's rules imposing this requirement, the Ninth Circuit has upheld a state order imposing the same requirement, *concededly based on no legal authority other than the vacated FCC rules.* And whereas the D.C. Circuit, following this Court, held on direct review that the FCC could not interpret a statutory provision permitting collocation of "necessary" equipment as authorizing the collocation of anything "useful," the Ninth Circuit refused to vacate an identical state order, *even though the court conceded that the order was premised on the FCC's invalidated legal interpretation.*

There is much more at stake in this case than simple interpretive differences. The Ninth Circuit has turned the jurisdictional structure of the Telecommunications Act on its head, dealing a crippling blow to Congress's effort to create a modern national telecommunications policy and vitiating this

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[1] Respondents MCI WorldCom and AT&T filed a joint Brief in Opposition. Petitioner will refer to "MCI" to mean MCI WorldCom and AT&T together.

Court's fundamental premise in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). The Ninth Circuit freed the states from "hew[ing]" to federal law as articulated by the FCC and construed by the Hobbs Act courts. 525 U.S. at 378 n.6. To make matters worse, it granted state regulators the power to create new regulatory obligations *out of whole cloth* and give them the full force of federal law, just as long as they do not violate any express prohibition of Congress. Even the FCC, the agency with primary jurisdiction under the Communications Act, has not been delegated such plenary authority. By purporting to authorize state regulators to follow or disregard FCC rules as they see fit — and even to resurrect *vacated* rules in disregard of the federal courts — the Ninth Circuit has set the balkanization of federal telecommunications policy in motion: one federal law now applies in the 41 states outside the Ninth Circuit, while up to 9 different versions of "federal" law can apply in the states of that Circuit. In fact, as U S WEST explains below, this disintegration has already begun.

ARGUMENT

1. Respondents' basic approach is to obscure what the WUTC and the Ninth Circuit have actually done in this case. While respondents speculate about what other provisions of the Act or state law the WUTC *might have* relied on for its arbitral orders, *see* WUTC Opp. at 16; MCI Opp. at 18, the record is clear that the only sources of legal authority on which the WUTC *in fact* based its orders were the vacated FCC rules. *See* Pet. at 8-9; Pet. App. at 28a-29a, 89a-90a. Even respondent Sprint concedes that "[t]he WUTC relied on implementing regulations promulgated by the [FCC] in ordering these agreement provisions." Sprint Opp. at 1.[2]

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[2] Moreover, the suggestion that the WUTC could have relied on state law to impose regulatory requirements that are not authorized by the Telecommunications Act is simply wrong. The various savings clauses respondents cite preserve state rules *only* to the extent they are "not

When the Eighth and D.C. Circuits invalidated these rules on direct Hobbs Act review, the *only* legal bases for the WUTC's orders disappeared.

The Ninth Circuit nevertheless felt free to ignore the decisions of these other circuits invalidating the FCC's rules (and authorized state regulators to do the same), at least in part because it believed those decisions to be "incorrect." Pet. App. at 9a. This was a violation of the Hobbs Act, pure and simple. The Hobbs Act vested these other courts with exclusive jurisdiction, not just to "enjoin[], set[] aside, or suspend[]" the FCC rules in question — to use MCI's misleading truncation of 28 U.S.C. § 2349(a), *see* MCI Opp. at 15-16 — but also to render any judgment "determining the validity" of those rules. 28 U.S.C. § 2349(a); *see also id.* § 2342. The Ninth Circuit was not at liberty to decide that the Eighth Circuit had gone about "determining the validity" of the combination rules incorrectly. Moreover, there is no difference in practice between doing what the Ninth Circuit did and formally reinstating the vacated rules: The FCC's rules were never self-executing, but rather depended on enforcement through the state commissions' interconnection arbitrations under 47 U.S.C. § 252. *See* 47 U.S.C. § 252(c)(1). By authorizing states to continue enforcing these regulatory duties in arbitrations, the Ninth Circuit has resurrected the FCC's vacated rules in every practical respect, even if the rules themselves remain off the books. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906 (8th Cir. 1984) (Hobbs Act bar applies wherever "practical effect . . . involves a

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inconsistent" with the federal Act or the FCC rules implementing it (as authoritatively construed by a Hobbs Act court). *See, e.g.*, 47 U.S.C. §§ 251(d)(1), 251(d)(3)(B), 261(c). The Eighth and D.C. Circuits ruled that the element combination and collocation requirements at issue *violated the plain language of the Telecommunications Act*; hence, any state law imposing the same requirements would be inconsistent with the Act and thus preempted.

determination of [a rule's] validity"), *vacated on unrelated grounds*, 476 U.S. 1167 (1986); *accord*, *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (Hobbs Act applied because judicial issue was equivalent "[i]n substance" to a redetermination of agency decision's validity).

Respondents instead claim that the Eighth and D.C. Circuits' decisions vacating the combination and collocation rules merely left an *absence* of FCC regulation that the WUTC was free to fill however it chose. *See, e.g.*, WUTC Opp. at 12, 17. But that just begs the question of where the WUTC gets the authority to impose any requirement in the first place. As noted above, the WUTC claimed no source of authority to issue its orders other than the FCC rules it was implementing. Respondents' suggestion that the WUTC possesses some kind of generic "plenary" authority under the 1996 Act to create new federal regulatory requirements (*see* Sprint Opp. at 19) is patently absurd: even the *FCC* does not "possess[] *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." *Comsat Corp. v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997) (internal quotation marks omitted).

Moreover, respondents mischaracterize the Eighth and D.C. Circuits' decisions. The Eighth Circuit did not simply hold, as the WUTC suggests, "that the 1996 Act does not require an incumbent to combine elements at the request of a competitor" (WUTC Opp. at 14); rather, it held that such a regulatory requirement in fact affirmatively *violates* the plain language of the Act. *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 759 (8th Cir. 2000) ("*Iowa Utilities Board II*") ("subsections (c)-(f) violate the plain language of the statute"); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) ("the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements

themselves").[3] Similarly, the D.C. Circuit did not simply say that the FCC's definition of necessary should be "better expla[ined]" (MCI Opp. at 21); instead, it held that a rule interpreting 47 U.S.C. § 251(c)(6) to permit the collocation of merely "used or useful" equipment "goes too far and thus 'diverges from any realistic meaning of the statute.'" *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000) (citation omitted). The Eighth and D.C. Circuit decisions did not simply create a void, nor did their decisions merely negate FCC authority while leaving other agencies free to act. Instead, these courts held that rules requiring incumbents to reconfigure their networks for competitors and to open their central offices to equipment that is simply "useful" to rivals *violate the Act*.

2. The Ninth Circuit thus should not have second-guessed the Eighth Circuit or decided the merits of the combination rules at all. But its ruling stands in irreconcilable conflict with the Eighth Circuit's decision in *Iowa Utilities Board II*, as even Sprint, MCI, and AT&T concede. *See* Sprint Opp. at 13-14; MCI Opp. at 3 n.6, 18-19 (joined by AT&T). MCI and AT&T themselves suggest that certiorari is necessary to resolve this conflict; hence, they have both petitioned for certiorari in *Iowa Utilities Board II*. *See WorldCom, Inc. v. Verizon Communications, Inc., petition for cert. filed*, No. 00-555 (U.S. Oct. 10, 2000); *AT&T Corp. v. Iowa Utils. Bd., petition for cert. filed*, No. 00-590 (U.S. Oct. 13, 2000).

Respondents suggest that the Court should use *Iowa Utilities Board II* to correct this conflict rather than the decision under review. But the Ninth Circuit's erroneous and boundless expansion of the state commissions' regulatory authority is presented and can be corrected only in this case.

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[3] Indeed, the WUTC acknowledges this elsewhere in its Brief in Opposition. *See* WUTC Opp. at 7 ("the Eighth Circuit decided that the mandatory combination rule *violates the Act*") (emphasis added).

Absent a grant of certiorari here, the Ninth Circuit will continue to allow state regulators to impose whatever regulatory requirements they choose in the name of federal law, without regard to whether the Act contains any affirmative authorization for such requirements. Moreover, if the Court fails to grant certiorari in this case, its rulings in any future case will be for naught. The Ninth Circuit has already made clear that a determination that the FCC's combination rules should remain vacated would not preclude state commissions in the Ninth Circuit from resurrecting the identical requirement. Even if the Court were to grant certiorari in *Iowa Utilities Board II*, it would also have to grant certiorari in this case to bring state regulators within the Ninth Circuit "to heel."

3. The decision under review likewise creates a clear circuit split on the meaning of 47 U.S.C. § 251(c)(6), which directs incumbent carriers to open their premises to competitors' equipment that is "necessary" for interconnection. The Ninth Circuit held that an order requiring an incumbent to collocate equipment that is merely "used or useful" for interconnection does not violate section 251(c)(6) or any other provision of the 1996 Act. *See* Pet. App. at 11a ("Although the Act may not require the provision, it certainly does not proscribe it."). The D.C. Circuit held just the opposite, ruling that a collocation requirement extending to equipment that is merely "used or useful" "goes too far and thus 'diverges from any realistic meaning of the statute.'" *GTE Serv. Corp.*, 205 F.3d at 424 (citation omitted).[4] The conflict between the two circuits could not be more plain.

Respondents attempt to distract the Court from this split by suggesting that the particular piece of equipment the

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[4] The D.C. Circuit ruled that "necessary" in 47 U.S.C. § 251(c)(6) must mean "required" or "indispensable," not merely "useful." *See* 205 F.3d at 422-24.

WUTC was considering (a "remote switching unit" or "RSU") might still meet the D.C. Circuit's stricter (and correct) standard of "necessity." Regardless of whether this may be true (and U S WEST avers it is not), this purely factual question cannot be determined for the first time on a petition for certiorari. The WUTC's post-hoc suggestion (WUTC Opp. at 19-20) that it in fact based its RSU decision on a number of factors that collectively added up to the proper legal standard is pure fiction: as the record makes plain, *see* Pet. App. 89a-90a, and as even the Ninth Circuit conceded, *see id.* at 10a, the WUTC unambiguously grounded its order on a "used or useful" collocation standard. Sprint's suggestion (Sprint Opp. at 16) that the *Ninth Circuit* made such findings about RSUs based "on an independent interpretation of [the Act] and the evidence presented in the parties' individual arbitrations" is an even greater stretch — one belied by the Ninth Circuit's cursory opinion and express *disclaimer* of any authority to review the WUTC's decisionmaking process. Pet App. at 10a-11a. Finally, MCI's speculation (MCI Opp. at 19-20) that the FCC might find, on remand from the D.C. Circuit, that RSUs do meet some stricter standard of "necessity" is simply irrelevant. Whatever the FCC may or may not say with regard to RSUs, the Ninth Circuit has still freed state commissions in its jurisdiction to order the collocation of *any* equipment that is merely "useful" to competitors, and there is nothing the FCC can do to bring these regulators back to the proper statutory standard.

4. The Court should not underestimate the practical effect of the Ninth Circuit's unlawfully deferential standard of review. By ruling that federal courts reviewing state orders under 47 U.S.C. § 252(e)(6) may only consider whether the state regulator has violated some express congressional prohibition, instead of asking whether the order has any basis in the Act, the Ninth Circuit has turned Congress's legislation into a license for state regulators to wield federal authority however they see fit. Moreover, by

treating the state regulatory decisionmaking process as an unreviewable "black box" even where, as here, the court *concedes* that the state regulator misapplied federal law, the Ninth Circuit disables the only check available to ensure that states do not apply federal law in a totally arbitrary fashion. Indeed, under the Ninth Circuit's standard of review, the WUTC could have divined U S WEST's obligations under the Act by flipping a coin or examining a sheep's liver, just as long as Congress had not expressly proscribed the end result.

The last time this problem arose, MCI assured the Court that "there is no reason to think [this issue] will ever arise again."[5] But the Ninth Circuit has now upheld at least five different state orders resurrecting different vacated FCC rules.[6] With each new instance of state regulators' defiance, MCI's repeated assertions that this problem is "idiosyncratic" or "rare" ring more and more hollow. *See* MCI Opp. at 17. In addition, respondents cite other courts that appear to have followed the Ninth Circuit's lead. *See* WUTC Opp. at 15; MCI Opp. at 24; Sprint Opp. at 14 n.7. The dam has clearly broken.

MCI's assurances that these cases will be "rare" are further undermined by its co-respondents. Sprint acknowledges that many FCC rules remain in various stages of rulemaking and Hobbs Act review in circuit courts around

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[5] Brief in Opposition at 14-15, *U S WEST Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3669 (U.S. June 29, 2000) (No. 99-1641).

[6] In addition to the three cases consolidated in US WEST's Petition, the Ninth Circuit upheld the same combination requirement in *MFS Intelenet*, 193 F.3d at 1121, and most recently upheld the same collocation requirement imposed by the Oregon Public Utility Commission in *U S WEST Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1056 (9th Cir. 2000) (upholding collocation requirement based solely on *MCI* decision below, with no analysis of state commission's basis for imposing requirement specifically in that case).

the country and in this Court. *See* Sprint Opp. at 20-21. At the same time, state commissions all over the country continue to arbitrate and approve interconnection agreements, and federal courts continue to review the commissions' actions under section 252(e)(6). Therefore, similar collisions between section 252(e)(6) courts and Hobbs Act courts are certain to arise on a regular basis.

Respondents suggest that such collisions will not be problematic, since there is no real need for uniformity in federal telecommunications policy. The WUTC, for example, actually says that Congress *never* intended that the law would be applied uniformly, since it provided for district court review of state regulators' decisions. *See* WUTC Opp. at 13-14, 24. But in another case, respondents have argued that it is absolutely essential that the Act be applied uniformly across the country. Respondent AT&T told this Court in a petition for certiorari in another case, filed just three days after its response here, that "Congress contemplated that competitive entry into local telecommunications markets would be governed by 'the new *federal* regime . . . to be guided by federal-agency regulations'" and that divergent interpretations of the Act "destroy[] the national uniformity that Congress sought to establish on the competitive rules of engagement."[7] And most important, this Court has already held that the Act establishes a unitary federal policy on the subjects it governs:

> [T]he question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. . . . [T]here is no doubt . . . that if the

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[7] Petition for a Writ of Certiorari at 27-28, *AT&T Corp. v. Iowa Utils. Bd., petition for cert. filed*, No. 00-590 (U.S. Oct. 13, 2000) (omission in original) (citation omitted).

> federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.

Iowa Utils. Bd., 525 U.S. at 378 n.6. The Court should grant certiorari in this case to bring the Ninth Circuit, and state regulators within its territory, back into line with the national telecommunications policy that governs the rest of the country.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the judgment below, and remand the case to the Ninth Circuit with instructions to follow the decisions of the Eighth and D.C. Circuits.

Respectfully submitted,

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